

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

MARIANO JUAREZ ROSALES

vs.

NATHANIEL QUARTERMAN

. . . . .

.  
. H-03-CV-1016  
. HOUSTON, TEXAS  
. APRIL 29, 2008  
. 9:00 A.M.  
.

TRANSCRIPT OF EVIDENTIARY HEARING  
BEFORE THE HONORABLE VANESSA GILMORE  
UNITED STATES DISTRICT JUDGE  
VOLUME 2 OF 2

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Proceedings recorded by mechanical stenography, transcript  
produced by computer-aided transcription.

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12 ALSO PRESENT:

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14 Proceedings recorded by mechanical stenography, transcript  
15 produced by computer-aided transcription.  
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- - - - -

09:13

1

P R O C E E D I N G S

2

THE COURT: Good morning, everybody. Please be seated.

4

All right. I think we are ready to proceed.

09:14

5

Mr. Rosales, can you hear us, sir?

6

MR. ROSALES: Yes, ma'am. Yes, your Honor.

7

THE COURT: All right. Good.

8

Then, are we ready to go, Mr. Gray --

9

MR. GRAY: Yes, your Honor.

09:14

10

THE COURT: -- where we left off yesterday?

11

**NORMA DAVENPORT, DULY SWORN, CONTINUED TO TESTIFY:**

12

**CROSS-EXAMINATION**

13

BY MR. GRAY:

14

Q. Ms. Davenport, are you ready to begin?

09:14

15

A. I'm ready. Tell me which book.

16

Q. You're the same person who left off testifying yesterday?

17

A. I'm afraid so.

18

Q. We were discussing Batson Juror Esmerelda Lopez.

19

THE COURT: What number was that, again? I forgot where we were.

09:14

20

21

MR. GRAY: Ms. Lopez was at Tab 20.

22

THE WITNESS: Okay.

23

BY MR. GRAY:

24

Q. Ms. Davenport, in your declaration you state that you

09:14

25

struck Ms. Lopez because Ms. Lopez answered twice that she

*Gray Cross of Davenport*

09:14 1 would require a defendant to testify, before changing her  
2 answer. Is Ms. Lopez' answer concerning a defendant's right  
3 not to testify a reason that you exercised a peremptory strike  
4 against her?

09:15 5 A. As I've explained to you a number of times, that's one of  
6 the reasons --

7 Q. It's a reason --

8 A. -- that went into the whole ball of wax.

9 Q. But it is of the reasons you --

09:15 10 A. It's one of the reasons.

11 Q. Okay. After the law concerning a defendant's right not to  
12 testify was explained to Ms. Lopez, she stated that she would  
13 follow the law. Is that correct?

14 A. I don't know where you're reading; but if you say that  
09:15 15 that's what she said, I'll take your word for it.

16 Q. Okay. If you could turn, please, to Page 24, starting at  
17 Line 25, behind Tab 20.

18 A. Page 24?

19 Q. Okay. She was asked, "Would you be able to find somebody  
09:16 20 guilty of a criminal offense without hearing both sides of the  
21 story, so to speak?"

22 Her answer was, "No, I don't think so."

23 The next question, "Would you be able to find the  
24 defendant guilty without hearing from the defense," I believe  
09:16 25 begins on Line -- Page 25, Line 8.

*Gray Cross of Davenport*

09:16

1 A. Yes.

2 Q. Are you following, Ms. Davenport?

3 A. I am.

4 Q. Okay.

09:16

5 "In other words, if you are only going to hear  
6 one side of the story or will you have to hear something from  
7 the defense in order to make a decision one way or the other?"

8 "I would like to hear something from the other  
9 side in order to make a decision."

09:16

10 "Okay."

11 A. She said "I would have to," not "like to."

12 Q. "Have to." Thank you.

13 "Okay. Well, the law would say that if the State  
14 proves its case beyond a reasonable doubt and if you are  
15 satisfied with that in your mind, you must find the defendant  
16 guilty, regardless of any other evidence. Would you be able to  
17 follow the law?"

18 "Yes."

19 "Okay. So, if the defendant didn't testify and  
20 we proved the case beyond a reasonable doubt, you say you will  
21 be able to find the defendant guilty?"

22 "Yes."

23 Do you agree that she, after the law had been  
24 explained to her, clearly testified twice that she would be  
25 able to follow the law and find the defendant guilty if he

09:17

*Gray Cross of Davenport*

09:17 1 didn't testify?

2 A. That's what she said.

3 Q. Okay. Please turn to Tab 11, Page 244. This is the tab  
4 relating to Seated White Juror Pearl Plander.

09:17 5 If you could begin, please, at Line 19 at the  
6 bottom of Page 244.

7 MR. GRAY: Can you hear me?

8 THE COURT REPORTER: I'm having trouble. If you could  
9 speak up, please.

09:17 10 MR. GRAY: Okay.

11 BY MR. GRAY:

12 Q. Page 244, Line 19, "Would you be able to listen to only one  
13 side -- one side and not hold it against the defendant if he  
14 doesn't testify and make a decision on that or would you  
09:18 15 require him to testify before you could say?"

16 Answer, "I'm not sure."

17 "Okay. Can we start by agreeing that you would  
18 like to hear from the defendant?"

19 "Right."

09:18 20 "And you understand that the law says he doesn't  
21 have to?"

22 "Right."

23 "Okay. Now, it doesn't matter if you agree with  
24 the law or not. You have an absolute right to believe whatever  
09:18 25 you want to believe, and none of us are going to argue with

*Gray Cross of Davenport*

09:18 1 you."

2 "Uh-huh."

3 "If your personal belief is that he ought to  
4 testify and you would want to hear before you could make a  
09:18 5 decision, all you have to do is tell us."

6 "Right. I would like to hear."

7 "Now, granted that you would like to hear, would  
8 you require him to testify before you could make a decision?"

9 "I believe so."

09:18 10 "And in doing so, if he does not testify, would  
11 you hold it against -- hold that against him; you know, if he  
12 doesn't testify, he must be hiding something?"

13 "No, I don't think I would hold it against him."

14 "Would you just, then, be unable to make a  
09:18 15 decision without hearing all the facts?"

16 "I probably would be."

17 And he continues testifying on this page and is  
18 asked -- or she continues testifying on this page and is asked,  
19 "Okay. I can appreciate that. But as you sit here right now,  
09:19 20 what is your feeling as to what you would do?"

21 "Well, I could probably go on without his  
22 testimony; but I would say that I would do that. But now, if  
23 you came right down to it, I don't know if I would or not."

24 "So, are you saying there's a chance that you  
09:19 25 wouldn't make a decision absolutely not?"



*Gray Cross of Davenport*

09:19

1

"There's a chance."

2

Sorry. Excuse me.

3

"So, you're saying there's a chance you wouldn't make a decision or you -- or you absolutely not [sic]?"

4

09:19

5

Answer, "There's a chance."

6

Was Ms. Plander's testimony on this issue acceptable to you?

7

8

A. Evidently it was by the time we got through, because we accepted her as a juror and she was able to make a decision

9

09:19

10

without hearing from the defendant.

11

Q. Okay. Do you see a distinction between Ms. Plander's testimony, on the one hand, that she -- there's a chance, that she wasn't sure, and Ms. Lopez' testimony that she could?

12

13

14

A. Sure. But there were other things that came into play with Ms. Lopez.

09:19

15

16

Q. Many of which we discussed yesterday?

17

A. Some of which we did, yes.

18

Q. Okay. On this issue, do you agree that Ms. Lopez' answers were clearer and more favorable than those of Ms. Plander?

19

09:20

20

A. On that one issue, yes.

21

Q. When you reviewed Ms. Lopez' juror questionnaire, you noted that she was a Mexican female, lives north of downtown.

22

23

Did the fact that Ms. Lopez was a Mexican woman who lived in an Hispanic neighborhood of Houston play any part in your decision to exercise a peremptory strike against her?

24

09:20

25

*Gray Cross of Davenport*

09:20 1 A. No, I don't believe so. But it did make a difference that  
2 she had six children in Little League and Mr. Rosales was a  
3 Little League coach.

4 Q. How do you know that Mr. Rosales was a Little League coach?

09:20 5 A. Because we did background checks on him. That's one of the  
6 things they kept telling us, "He's a good guy. He's a Little  
7 League coach."

8 Q. Is that a reason that's stated in your affidavit?

9 A. I don't believe so. Affidavit for --

09:20 10 Q. Okay. Do you recall that -- do you remember that that  
11 might be a reason that you struck Ms. Lopez?

12 A. Yeah. I told you at the deposition I couldn't remember  
13 everything that I did 23 years ago. And it comes back  
14 gradually.

09:20 15 Q. Did we discuss Ms. Lopez in your deposition?

16 A. I don't know. Probably.

17 Q. I'd like to turn to Mr. Hamilton, James Hamilton. You  
18 don't need to go there yet, but his materials are at Tab 18.

19 In your affidavit, at Page 2 you state that  
09:21 20 Mr. Hamilton gave conflicting answers on his short and long  
21 juror forms concerning the question "whether you, a family  
22 member, or a close friend has been involved in a criminal case  
23 as the defendant, victim, witness." What did you mean by that?

24 A. Just exactly what it says.

09:21 25 Q. Okay. Were you referring to his answers on his short form

*Gray Cross of Davenport*

09:21

1 juror form?

2 A. The short and the long form.

3 Q. Okay. Is this your note?

4 If you turn to the third page, second sheet of  
09:21 5 paper in Mr. Hamilton's section, behind Tab 18.

6 A. Okay.

7 Q. Is this your note, "Yes on long," next to his answer on the  
8 short form?

9 THE COURT: What page are you on, again, please?

09:22

10 MR. GRAY: Your Honor, the third page -- it's the one  
11 with the short juror forms --

12 THE COURT: Okay.

13 MR. GRAY: -- three forms in a page, and

14 Mr. Hamilton's is the second short form down, the top of the  
09:22 15 page.

16 THE COURT: Right.

17 A. Where the "yes" is circled? Is that what you're talking  
18 about?

19 BY MR. GRAY:

09:22

20 Q. "Yes on long" in the box where it says -- where it asks the  
21 question about criminal cases.

22 A. Yes.

23 Q. Okay. Do you recall why you wrote that note, "Yes on  
24 long"?

09:22

25 A. Because that's what he told us.

*Gray Cross of Davenport*

09:22 1 Q. Okay. The card asked the juror whether the -- the card  
2 asked whether the juror has been an accused, a complainant, or  
3 a witness; and Mr. Hamilton checks "no." Is that correct?

4 If you'd please read the question where  
09:22 5 Mr. Hamilton checked "no" on that card.

6 A. Are you talking about the small card now?

7 Q. Yes, ma'am.

8 A. It says, "Have you ever been a party to a lawsuit?"

9 And he said, "No."

09:23 10 "Any bodily injury ever sustained requiring  
11 medical attention by you, by your family?"

12 "No."

13 Q. I'm looking for -- if you go down, it's the third box on  
14 the left-hand side of the short form. It says, "Have you ever  
09:23 15 been an accused, complainant, or witness in a criminal suit?"

16 Mr. Hamilton checked "no."

17 A. Okay. I see that.

18 Q. Is that an accurate answer, from what we know about  
19 Mr. Hamilton?

09:23 20 A. Well, I don't remember now. I don't know if he testified  
21 in his brother's case.

22 If -- he answered "yes." But, "Have you or  
23 somebody else ever been involved in a criminal case as a  
24 defendant, witness, or complainant?" And he said "yes."

09:23 25 Q. Okay. Is it possible that Mr. Hamilton was answering "no"

*Gray Cross of Davenport*

09:23 1 because he had never been accused as a criminal defendant  
2 himself?

3 A. I have no idea. But it also asks if he had ever been a  
4 witness.

09:24 5 Q. Okay. But do we know whether Mr. Hamilton was a witness?

6 A. I don't know.

7 Q. Okay. Could you please turn to Mr. Hamilton's long form  
8 juror questionnaire on Page 2?

9 A. Okay.

09:24 10 Q. And the question in the middle of the page appears, "Have  
11 you, a family member, a close friend ever been personally  
12 involved in a criminal case as a defendant, victim, witness, or  
13 complainant?"

14 And Mr. Hamilton indicates "yes." Would you  
09:24 15 agree with me?

16 A. I don't see where you're reading.

17 THE COURT: I don't either.

18 BY MR. GRAY:

19 Q. It's the juror questionnaire, Page -- if you go by the  
09:24 20 pagination in the upper right-hand corner, Page 22 of 47, and  
21 the next page is 23 of 47.

22 A. Okay.

23 Q. Go halfway down that page.

24 A. Of which, Page 22 or 23?

09:24 25 Q. Twenty-three, please, ma'am.

*Gray Cross of Davenport*

09:24

1 A. Okay.

2 THE COURT: Oh, 23.

3 MR. GRAY: Yes.

4 BY MR. GRAY:

09:24

5 Q. "Have you, a family member, a close friend" -- it's right  
6 below where he's written in the response "The United States Air  
7 Force."

8 A. Okay. That's the one we've been talking about that he  
9 has -- the "yes" was circled.

09:25

10 Q. Right.

11 A. Is that right?

12 Q. "Yes" was circled, and he later testified to the fact that  
13 his brother had been involved in a criminal case.

14 Is that an accurate answer, based on what we know  
15 about his testimony?

09:25

16 A. I believe so.

17 Q. Okay. Is there necessarily a conflict between his answer  
18 about whether he had been involved in a criminal case, on the  
19 short form, and whether he or anyone that he knew had been  
20 involved in a criminal case, on his long form?

09:25

21 A. The short form asked if he had been "an accused, a  
22 defendant, or a witness."

23 Q. Right.

24 A. I don't know if he was a witness in his brother's case or  
25 not. I've said that twice now.

09:25

*Gray Cross of Davenport*

09:25 1 Q. Right. Well, then, how do you know that he was a witness  
2 if you don't know -- how do you know?

3 A. I don't know. I said I don't know if he was a witness.  
4 So, that is a conflict if he were. So, I had to inquire.

09:26 5 Q. Anything that suggests that he might have been a witness in  
6 his brother's case?

7 A. Sounds reasonable to me, but that's just pure speculation.

8 Q. Okay. Pure speculation.

9 In your affidavit, you said that you struck  
09:26 10 Mr. Hamilton because he testified that in the event of  
11 conflicting testimony he might hold the State to a higher  
12 burden than "beyond a reasonable doubt." That's on Page 2 of  
13 your affidavit.

14 Is that a reason that you struck Mr. Hamilton?

09:26 15 A. It was probably one of them.

16 Q. All right. Do you know that Mr. Hamilton would impose a  
17 higher burden?

18 How do you know that Mr. Hamilton would impose a  
19 higher burden? Excuse me.

09:26 20 A. I don't know that for sure.

21 Q. Okay. What's the basis for your belief that he might  
22 impose a higher burden?

23 A. Evidently, from reading through the question and answer.

24 Q. Okay. Anything more specific you have in mind?

09:26 25 A. No. I don't remember all of Mr. Hamilton's questions and

*Gray Cross of Davenport*

09:26 1 answers.

2 Q. Could you turn your attention, please, to Page 20 of his  
3 transcript?

4 Beginning at Line 10, you asked, "Do you think  
09:27 5 it's a fair burden to put on the State involving a death  
6 penalty case that we have -- we only have to prove beyond a  
7 reasonable doubt a person's guilt when you know that they may  
8 have -- may face the death penalty?

9 And he answers, "I think it's fair."

09:27 10 "Okay. It's not too strong?"

11 "No."

12 "And it's not too lenient?"

13 "No."

14 "Well, during the guilt stage, I take it, then,  
09:28 15 you wouldn't have any trouble with 'beyond a reasonable  
16 doubt.'"

17 "No, I wouldn't."

18 Is there anything about Mr. Hamilton's answers to  
19 the -- your questions there that causes you concern?

09:28 20 A. Not so far.

21 Q. Okay. You then go on to pose a hypothetical about a car  
22 accident, at the bottom of Page 20 and the top of 21.

23 And if you would, please turn your attention to  
24 the bottom of Page 22, where Mr. Hamilton tries to give an  
09:28 25 answer to the hypothetical.



*Gray Cross of Davenport*

09:28 1 He says, "I would have to make sure I am  
2 understanding what you are saying, because you are talking  
3 about a red car and then a black car and whether it had two  
4 doors or four doors. It's more than one black car out there,  
09:28 5 and there is more than one red car out there. If we are just  
6 going on the assumption that the car was red or black, then I  
7 probably would need something else."

8 And the Court interrupts and instruct the witness  
9 not to get hung up on the illustration and restates the burden  
09:29 10 of proof.

11 Take a minute. Is there something about that  
12 exchange that suggests that Mr. Hamilton was retracting from  
13 his previous clear answers that he could follow the appropriate  
14 burden of proof in the penalty stage?

09:29 15 A. Certainly wasn't as clear and strong, was it?

16 Q. Is it possible that he was just having difficulty  
17 understanding a complex hypothetical?

18 A. Yeah. And that's another problem.

19 Q. Does Judge Kegans' attempt to clean up the problems with  
09:29 20 the illustration suggest that she was concerned he didn't  
21 understand the hypothetical?

22 A. Probably.

23 Q. Please turn to Tab 15, which contains the juror information  
24 for Cheryl Williamson.

09:30 25 Okay. Ms. Williamson testified initially that

*Gray Cross of Davenport*

09:30 1 the burden on the State would be higher in death penalty cases.  
2 That was her first testimony. At Line -- Page 26, Lines 3  
3 through 7 --

4 A. I'm sorry. What?

09:30 5 Q. Page 26, Lines 3 through 7. The question starts at Line  
6 25.

7 "Well, 'beyond a reasonable doubt' is the burden  
8 of proof that is required in any criminal case. It doesn't  
9 make any difference if it's shoplifting or burglary or capital  
09:30 10 murder. We have to prove beyond a reasonable doubt. Are you  
11 saying because of the case, that it's a capital murder case and  
12 the death penalty is involved, you would require a higher  
13 standard than 'beyond a reasonable doubt'?"

14 "Yes. My initial feeling would be 'yes.'"

09:31 15 Would you agree with me that Ms. Williamson's  
16 answers -- initial answer on the burden of proof was more  
17 problematic than Mr. Hamilton's?

18 A. It wasn't as strong.

19 Q. Wasn't as strong?

09:31 20 Was Ms. Williamson's initial answer one that  
21 would be acceptable to the State?

22 A. If we stopped right there, probably not.

23 Q. Okay. As we discussed yesterday, Beverly Willett also  
24 testified that she believed she would have to be convinced  
09:31 25 beyond all doubt in a death penalty case and stated that if she

*Gray Cross of Davenport*

09:31 1 had any qualms at all, "I couldn't, you know -- if I was on the  
2 jury and we didn't -- did find the defendant guilty but there  
3 was any doubt, you know, a possible doubt, then I couldn't say,  
4 'Yes, take his life.'"

09:31 5 Is that an acceptable answer for the State?

6 A. No. And I explained about Ms. Willett yesterday. I have  
7 no idea, just reading the bare transcript, why we accepted her.

8 Q. Okay. Could we please turn to Raymond Trevino? He's at  
9 Tab 23.

09:32 10 In your affidavit, you said that you struck  
11 Mr. Trevino because of conflicting answers on his short and  
12 long juror forms, concerning the difference between civil and  
13 criminal trials. What did you mean by that?

14 A. Evidently, there's some conflicting answers.

09:32 15 Q. Okay. Was Mr. Trevino asked about an apparent conflict,  
16 during voir dire?

17 A. I don't remember.

18 Q. At the bottom of Page 2 of your affidavit, you say you  
19 struck -- you exercised a peremptory strike against Mr. Trevino  
09:32 20 because friends and cousins had been to prison. Is that  
21 correct? Is this a reason that the State exercised a  
22 peremptory strike against Mr. Trevino?

23 A. Where are you reading that?

24 Q. The bottom of Page 2 of your affidavit.

09:33 25 A. Okay. I see it.

*Gray Cross of Davenport*

09:33 1 That's -- that's a factor. It's a factor.

2 Q. That was factor?

3 THE COURT: Is that behind Tab 15?

4 THE WITNESS: I don't know if it's in here or not.

09:33 5 MR. GRAY: That's behind Tab 1, your Honor. It's just  
6 one of the reasons on -- I've already stated what the affidavit  
7 says --

8 THE COURT: Okay. Okay. Okay.

9 MR. GRAY: -- "friends and cousins have been to  
09:33 10 prison."

11 THE COURT: Okay. I was just looking in --

12 MR. GRAY: Actually, it is behind Tab 15, your Honor,  
13 if you go to the third page, the last line.

14 THE WITNESS: It's just hard to find all that real  
09:33 15 fast.

16 MR. GRAY: Yeah, I know.

17 THE COURT: Tab 15 in the first book?

18 MR. GRAY: Third page.

19 THE WITNESS: Twenty-three.

09:34 20 THE COURT: Oh, 23. I'm sorry.

21 THE WITNESS: Yes.

22 THE COURT: I'm on Tab 15. I'm on the wrong tab.

23 MR. GRAY: I apologize.

24 BY MR. GRAY:

09:34 25 Q. And, then, turning to Mr. Trevino's testimony at Page 145,

*Gray Cross of Davenport*

09:34 1 he was asked, "Do you think the criminal justice system, the  
2 prosecutors' office or the police or whatever, treated those  
3 people unfairly or do you think that they had a fair shake with  
4 the law?"

09:34 5 And responded, "I think it was fair, the  
6 punishment that was assessed to them."

7 "Okay. Do you hold any animosity toward the  
8 police, the district attorney's office, or the criminal justice  
9 system in those cases?"

09:34 10 "No, sir."

11 Do you have any concerns about Mr. Trevino's  
12 answers to these questions, concerning his friends and cousins?

13 A. I'm sorry. Was that a question?

14 Q. Yes. Do you have concerns about Mr. Trevino's answers  
09:35 15 about his friends' and cousins' involvement with the criminal  
16 justice system?

17 A. Well, not -- just reading it, I don't know. Listening to  
18 him at the time, I don't know if I believed him or not.

19 Q. Does his answer suggest that he would not be biased as a  
09:35 20 result of his association with people who had been involved in  
21 the criminal justice system?

22 A. That's what it looks like.

23 Q. And I know we discussed Ms. Willett yesterday, but are you  
24 aware that she had brothers who had been accused of unspecified  
09:35 25 crimes and that she was corresponding with an individual who

*Gray Cross of Davenport*

09:35 1 was incarcerated --

2 A. I am.

3 Q. -- at the time of the trial?

4 Okay. Still, with respect to Mr. Trevino, in

09:35 5 your affidavit you also indicate that Mr. Trevino was not firm

6 in his opinions of requiring either motive or premeditation.

7 Is that a reason you struck Mr. Trevino?

8 A. It was one of the factors, I'm sure.

9 Q. What do you mean by "not firm in his motive or

09:36 10 premeditation"?

11 A. Just that.

12 Q. That he -- it wasn't clear to you that he would require

13 motive or premeditation or --

14 A. I guess it was not clear to me that he was clear.

09:36 15 Q. Would not require --

16 I'm sorry.

17 A. Yeah.

18 Q. Okay. If you could, please turn to Tab 11, which contains

19 the juror materials for Pearl Plander.

09:36 20 A. Okay. Are we going back to Mr. Trevino so I should save

21 that?

22 Q. Probably not.

23 THE COURT: Tab 11?

24 MR. GRAY: Tab 11, Pear Plander's juror material.

09:36 25 BY MR. GRAY:

*Gray Cross of Davenport*

09:36 1 Q. If you'd turn just to the sheet just before -- just before  
2 the blue divider, in Ms. Plander's materials.

3 A. Okay.

4 Q. This is the capital punishment attitude scale. And  
09:37 5 Ms. Plander checks that she agrees that capital punishment is  
6 justified only for premeditated murder.

7 Do you know why you accepted Ms. Plander  
8 notwithstanding her belief that premeditation would be required  
9 for the death penalty?

09:37 10 A. Well, premeditation really didn't bother me because I  
11 thought we had premeditation pretty clearly in this case.

12 Q. Okay. Was that a reason that you struck Mr. Trevino?

13 A. No. I think the real reason we struck Mr. Trevino was,  
14 before he got through, he wanted the judge to ask the defendant  
09:37 15 if he knew him, because he thought he had seen him at his  
16 church and he knew him and he wouldn't be fair.

17 Q. If that was the real reason you struck him, why did you  
18 list a reason having to do with premeditation and motive?

19 A. That's a factor. It's a factor. It's not the reason.

09:38 20 Q. Okay.

21 A. And I also put that in my affidavit.

22 Q. Okay. Could you please turn to Tab 16, which contains the  
23 juror materials for Joyce Wojdyla?

24 A. For who?

09:38 25 Q. Let me just ask you. When you asked Ms. Wojdyla whether

*Gray Cross of Davenport*

09:38 1 she had a problem if the State could not prove motive,  
2 Ms. Wojdyla answered, "Well, again, I think if you could prove  
3 motive that would make the case a little better, more well  
4 defined."

09:38 5 Was that -- Ms. Wojdyla's answer acceptable to  
6 you?

7 It's on Page four fifty -- actually, I'm not  
8 sure. It's on Page -- between 451 and 453 of Tab 16.

9 A. Well, again, it's okay.

09:39 10 Q. It's at the bottom portion of --

11 A. It's okay. It's okay. We had motive, too.

12 Q. Okay. I'd like to turn to Edward Saenz, Juror Saenz. In  
13 your affidavit, you said that you struck Mr. Saenz because of  
14 conflicting answers on his short and long juror form between  
09:39 15 civil and criminal trials.

16 Do you recall whether he was asked about that  
17 apparent conflict, during his voir dire?

18 A. I don't remember.

19 Q. Okay. Did you strike any potential juror at Mr. Rosales'  
09:39 20 trial because of race?

21 A. No, sir.

22 Q. Not even in part?

23 A. No, sir.

24 Q. And you're sure that race was not a reason behind any of  
09:39 25 the strikes?



*Gray Cross of Davenport*

09:40

1 A. It wasn't a reason behind any of my strikes, no.

2 Q. Okay. Did anyone ever instruct you to note the race of  
3 potential jurors on the questionnaires --

4 A. No.

09:40

5 Q. -- and juror cards?

6 A. No, sir.

7 Q. During your deposition, you testified that you would not  
8 ask minority jurors about their attitude towards the police  
9 because you didn't want to create an appearance of -- even an  
10 appearance of improper questioning on the basis of race. Is  
11 that an accurate statement of your practice?

09:40

12 A. That's what I said.

13 Q. Okay. If you were concerned about a juror's attitude  
14 towards the police, how could you resolve that concern without  
15 asking questions?

09:40

16 A. Well, sometimes you have to even if you don't normally do  
17 it.

18 Q. In those situations, you would ask questions?

19 A. If I had to, yes.

09:40

20 MR. GRAY: That's the end of questioning. Thank you  
21 very much.

22 THE COURT: Are you going to have any redirect?

23 MS. MIRANDA: Yes, ma'am. Yes, ma'am.

24 THE COURT: Ms. Miranda --

09:41

25 MS. MIRANDA: Yes, ma'am.

*Gray Cross of Davenport*

09:41

1

THE COURT: -- are you ready to go?

2

MS. MIRANDA: Before we do, your Honor, I would like to mark one exhibit.

4

THE COURT: Let me do something before we do that.

09:41

5

Let me move the mic over from that side of the room to the other; and then, that way, we can hear you a little bit better.

6

7

MS. MIRANDA: I would like to introduce Exhibit 5.

8

It's another juror questionnaire.

9

I mistakenly thought the binders contained all of them. So, we would like to introduce this extra one.

09:41

10

11

THE COURT: Okay. Who is it?

12

MS. MIRANDA: The questionnaire is for Juror Donna Douglas Cooper.

13

14

THE COURT: Pardon me?

09:41

15

MS. MIRANDA: Donna Douglas Cooper.

16

THE COURT: Okay. And everybody has had a chance to see that?

17

18

MS. MIRANDA: Yes. And she has a copy, and this can be your copy.

19

09:41

20

THE COURT: So, where is -- oh, this will be a whole separate exhibit.

21

22

MS. MIRANDA: Yes.

23

THE COURT: We're going to do this Exhibit Number 5, and it's the juror questionnaire of Donna Douglas Cooper.

24

09:42

25

That's marked as Exhibit Number 5.

*Gray Cross of Davenport*

09:42 1 Any objection, then, from the petitioner?

2 MR. GRAY: No. No, your Honor.

3 THE COURT: All right. Then, we'll just put that,  
4 then, as Joint Exhibit 5, then. Joint Exhibit 5 is admitted.

09:42 5 All right, Ms. Miranda.

6 **REDIRECT EXAMINATION**

7 BY MS. MIRANDA:

8 Q. Ms. Davenport, yesterday Mr. Gray asked you whether you  
9 were guessing or speculating about the reasons that you're  
09:42 10 offering to this Court for your strikes during the trial of  
11 Mr. Rosales.

12 Can you tell us how difficult it is to try and  
13 remember the exact reasons why you struck a juror?

14 THE COURT: Okay. Let's just assume that it's  
09:42 15 difficult to remember something 25 years ago. Move on to  
16 something else.

17 MS. MIRANDA: Okay.

18 THE COURT: That's called "bolstering."

19 MS. MIRANDA: Okay.

09:42 20 THE COURT: I think I can take judicial notice of it.

21 MS. MIRANDA: Okay. Thank you, your Honor.

22 THE COURT: We all slept since then, right?

23 BY MS. MIRANDA:

24 Q. Are your reasons for liking or disliking a juror always  
09:43 25 easy to articulate?

*Miranda Redirect of Davenport*

09:43

1 A. No.

2 Q. Are they always apparent on the face of a cold record?

3 A. Sometimes they're never apparent on the face of just a cold  
4 written record.

09:43

5 Q. Okay. How often in picking a juror does your reason for  
6 striking that juror come down to one precise reason?

7 A. Not very often.

8 Q. Is it -- okay.

9 A. Unless they really make a statement that backs them into a  
10 corner that they can't get out of.

09:43

11 Q. Okay. In picking a jury, do you get to sit and compare all  
12 of the jurors at once in a capital case or do you have to sort  
13 of take them in the order that they come?14 A. You have to take them in the order they come. And they  
15 came in groups of 10 to 12, and I believe there were seven  
16 groups that came in.

09:43

17 Q. Okay.

18 A. And we didn't know who -- any of the other groups that  
19 would follow. We only dealt with one group at a time.

09:44

20 Q. Okay. I want to talk a little bit about your notes that  
21 you took. Were those notes made contemporaneously with your  
22 examination of the individual voir dire jurors?

23 A. Yes, they were.

24 Q. Okay. Did you ever write things on the notes that weren't  
25 really important, that were more just curiosity?

09:44

*Miranda Redirect of Davenport*

09:44 1 A. Sometimes I just wrote things just to keep myself awake.

2 Q. Did you ever doodle on the notes?

3 A. Pardon me?

4 Q. Did you ever doodle on the notes?

09:44 5 A. I did on several of them.

6 Q. Okay. Did you ever use those notes to communicate with  
7 your co-counsel?

8 A. Sometimes, yes.

9 Q. Okay. Do you remember exactly why you made all the

09:44 10 notations that you made?

11 A. A lot of them were just because it -- I don't know. I  
12 don't know why I made a lot of them, actually.

13 Q. Okay. I want to talk for a second about your notations  
14 regarding the neighborhoods. Now, yesterday it was implied  
09:45 15 that you made notes on the neighborhood as a way to track  
16 minority jurors. Do you recall that testimony?

17 A. I do.

18 Q. Okay. If you will, look with me at Mr. Kelley's juror  
19 questionnaire behind Tab Number 5. And to your recollection,  
09:45 20 was Mr. Kelley a minority juror in this case?

21 A. He probably wasn't. Nobody has mentioned it today.

22 THE WITNESS: We just lost him, Judge.

23 No. He's back again.

24 THE COURT: There it is.

09:46 25 You can still see us and hear us, right,

*Miranda Redirect of Davenport*

09:46 1 Mr. Rosales?

2 MR. ROSALES: (Indicating).

3 THE COURT: Can you still see us and hear us sir?

4 MR. ROSALES: Yes, ma'am.

09:46 5 THE COURT: Okay. All right.

6 BY MS. MIRANDA:

7 Q. Can you tell us whether you made any notations on

8 Mr. Kelley's juror questionnaire, regarding the neighborhood in

9 which he lived?

09:46 10 A. I did.

11 Q. Okay. What notation did you make?

12 A. Excuse me. I put, "Cypress."

13 Q. Okay. If you would, please, look at Charles Smith's juror

14 affidavit behind Tab Number 12.

09:46 15 A. Charles Smith?

16 Q. Yes, ma'am.

17 Did you make any notations on his juror

18 questionnaire, regarding the neighborhood or area of town in

19 which he lived?

09:47 20 A. I don't -- I don't see any that you're talking about.

21 Q. Okay.

22 A. It looks like I may have written "Houston", H-O-U.

23 Q. Okay. And what's next to that?

24 A. "78."

09:47 25 Q. All right. Do you have any recollection of what that is?

*Miranda Redirect of Davenport*

09:47 1 A. I don't think it's his age. I don't know if it's the end  
2 of a zip code.

3 Q. Okay. Okay. Was Mr. Smith a minority juror, to your  
4 knowledge?

09:47 5 A. No, he wasn't.

6 Q. Okay. If we would look at the juror questionnaire for  
7 Lorene Thornton, which is in the other binder.

8 THE COURT: When you say "other," what do you mean?

9 THE WITNESS: The other black one.

09:47 10 MS. MIRANDA: I apologize, your Honor. Exhibit --  
11 Joint Exhibit 1B.

12 BY MS. MIRANDA:

13 Q. Now, to your knowledge, was Ms. Thornton a minority juror  
14 in this case?

09:48 15 THE COURT: I don't know what tab you're on.

16 MS. MIRANDA: I apologize. Forty-one.

17 A. No, I don't think she was.

18 BY MS. MIRANDA:

19 Q. Okay. Did you make a notation regarding --

09:48 20 A. Yes. I said, "north of downtown."

21 Q. Okay.

22 A. She had not filled it in.

23 Q. Okay. And, then, if you would, please, look for me at  
24 Exhibit 5, what has been marked as Joint Exhibit 5.

09:48 25 A. Okay.

*Miranda Redirect of Davenport*

09:48 1 Q. For Ms. Cooper, did you make a notation on her  
2 questionnaire?

3 A. I did. I put, "Deer Park."

4 Q. Okay. And to your knowledge, was she a minority juror in  
09:48 5 this case?

6 A. No, Ms. Cooper was not.

7 Q. Okay. All right. I'd like to talk now about some of the  
8 individual jurors that were struck and the reasons in your  
9 affidavit. And we'll start in the back with Mr. Saenz.

09:49 10 A. Okay.

11 Q. How many reasons did you articulate in your affidavit for  
12 striking Mr. Saenz?

13 A. I gave eight little paragraphs. Some of them contain more  
14 than one reason, I guess.

09:49 15 Q. Okay.

16 THE COURT: I'm sorry. You know what? Could we -- I  
17 forgot where her affidavit is. Which is it?

18 MS. MIRANDA: Her affidavit -- I apologize, your  
19 Honor -- is in -- I believe it's Joint Exhibit A, Tab 1.

09:50 20 THE COURT: A?

21 MS. MIRANDA: Joint Exhibit 1A, Tab 1.

22 THE COURT: Oh, okay.

23 That's right. I forgot. I just -- I've been  
24 reading it in different places. I couldn't remember where it  
09:50 25 was.



*Miranda Redirect of Davenport*

09:50 1 Thank you.

2 MS. MIRANDA: Okay.

3 THE COURT: Would you ask your question again, please?

4 MS. MIRANDA: Yes.

09:50 5 I believe my question was how many different

6 reasons she gave for striking Mr. Saenz.

7 THE COURT: Mr. who?

8 MS. MIRANDA: "Saenz."

9 THE COURT: "Saenz"?

09:50 10 MS. MIRANDA: "Saenz." Sorry. "Saenz."

11 THE WITNESS: And I responded that I had eight short

12 paragraphs.

13 BY MS. MIRANDA:

14 Q. Okay. Okay. Now, Mr. Gray asked you about one of those

09:50 15 reasons in particular, the fact that Mr. Saenz gave conflicting

16 answers. Was that, in fact, the only reason that you struck

17 him?

18 A. No.

19 Q. Okay.

09:51 20 A. No.

21 Q. By looking over your affidavit, can you tell us what was

22 the most troubling part of his voir dire testimony, most

23 concerning part to you as a prosecutor?

24 A. Well, there are probably two of them.

09:51 25 Q. Okay.

*Miranda Redirect of Davenport*

09:51 1 A. He kept changing his mind about whether or not he could  
2 consider the death penalty and the fact that Walter Boyd chose  
3 not to question him at all and just accepted him.

4 Q. Okay. Okay. Let's talk now about Mr. Trevino. Now,  
09:52 5 during his testimony in voir dire, I believe you stated earlier  
6 Mr. Trevino indicated that he might know the defendant from his  
7 church?

8 A. Yes.

9 Q. If you would look with me behind Tab Number 23 and Page  
09:52 10 Number -- starting on Page Number 166 of his voir dire  
11 testimony -- and I'm just going to give you a moment to review  
12 the next couple of pages, if you would just read over those  
13 quickly.

14 A. Okay.

09:53 15 Q. Okay. And, specifically, if you'll look at Page 166, Line  
16 Number 7, can you tell the Court what Mr. Trevino indicated to  
17 the Court?

18 A. Basically, that he thought maybe the defendant was somebody  
19 he recognized from his church. He couldn't think of his name,  
09:54 20 and wanted the judge to ask Mr. Rosales if he knew Mr. Trevino  
21 and recognized him. And then he wanted to know where he lived  
22 and wanted questions to find out if that was the person he  
23 thought it was from his church, because he goes to several  
24 different Catholic churches.

09:54 25 Q. Okay.

*Miranda Redirect of Davenport*

09:54 1 A. And the judge would not do that.

2 Q. Okay. And when Mr. Trevino was asked whether or not he  
3 could be a fair juror if this was indeed the person he thought  
4 it was, what did Mr. Trevino indicate to the Court?

09:54 5 A. He said, "No, I don't think I could."

6 Q. Okay. And if you'll continue reading, did Mr. Trevino give  
7 that answer more than once?

8 A. He did. He repeated it at least three or four times. I've  
9 forgotten. He did it a number of times.

09:54 10 Q. Okay. And, ultimately, I believe, if you keep going, after  
11 further questioning, Mr. Trevino did, in fact, finally concede  
12 that he could be a fair juror.

13 As a prosecutor, were you comfortable with that  
14 assurance?

09:55 15 A. No. I didn't believe him.

16 Q. Okay. Now, Mr. Gray asked you about a couple of different  
17 jurors, Ms. Plander and Mr. -- I'm sorry -- Ms. Plander and  
18 Ms. Wojdyla specifically and whether or not their answers were  
19 similar to the ones that Mr. Trevino had given during his voir  
09:55 20 dire.

21 To your knowledge, do either -- did either one of  
22 those jurors demonstrate during their voir dire an indication  
23 that they too knew the defendant and didn't think that they  
24 could be fair?

09:55 25 A. No. Mr. Trevino was the only one who did that.

*Miranda Redirect of Davenport*

09:55 1 Q. Okay. So, in your opinion, would you consider these jurors  
2 similar?

3 A. No.

4 THE COURT: Which -- you said Ms. Plander and  
09:55 5 Mr. Trevino were similar? Is that what you were asking?

6 I just want to make sure.

7 MS. MIRANDA: Sure. Sure.

8 THE COURT: You said --

9 MS. MIRANDA: Ms. Plander and Ms. Wojdyla. I'm not  
09:55 10 sure if that's how you say her name. W-O-D -- I think it's  
11 J-O-Y-L-A.

12 It was another juror that he had asked questions  
13 about and their responses indicating that they were similar to  
14 Mr. Trevino.

09:56 15 And my question was whether either one of those  
16 jurors, similar to Mr. Trevino, thought they knew the defendant  
17 and couldn't be fair jurors.

18 THE COURT: Oh, okay.

19 And what was your answer, ma'am?

09:56 20 THE WITNESS: The answer was "no."

21 THE COURT: I got confused on who we were talking  
22 about, you said so many names.

23 MS. MIRANDA: I apologize. It's difficult. It's a  
24 lot of names.

09:56 25 BY MS. MIRANDA:

*Miranda Redirect of Davenport*

09:56 1 Q. Now, with respect to Mr. Hamilton, did you have just one  
2 reason for striking this juror?

3 A. Well, I gave four reasons in my affidavit. And there could  
4 be more that I'm just not aware of at this time.

09:57 5 Q. Okay. The first reason that you have listed in there, it  
6 says, "His brother killed his wife and kid, found NG and sent  
7 to Rusk."

8 Could you tell us why this would concern you as a  
9 prosecutor?

09:57 10 A. That's just violence pretty close to home, isn't it?

11 Q. Okay. Was there any kind of relationship between  
12 Mr. Hamilton's case or any similarities between Mr. Hamilton's  
13 brother's case and the instant case?

14 A. I don't know all the facts of the brother's case, but there  
09:57 15 was more than one person killed and it involved a child.

16 Q. Okay.

17 A. A family.

18 Q. Okay. Are you aware of any other jurors that were  
19 presented in this case that had this particular type of violent  
09:57 20 situation this close to home?

21 A. Not that I can -- not that I can think of, no.

22 Q. Okay. Let's turn to Ms. Lopez. In your affidavit you  
23 noted that your handwritten notes indicated that during her  
24 testimony you thought -- and this is a quote -- "she was not  
09:58 25 too bright."

*Miranda Redirect of Davenport*

09:58 1 Okay. Can you tell us why, as a prosecutor, that  
2 might cause you concern?

3 A. Well, I wanted my -- the jurors to understand what the  
4 theories of law that we were going on were, what they meant,  
09:59 5 and whether -- whether they would be able to understand what  
6 was going on.

7 Q. Okay. And why might the conflicting answers bother you?

8 A. It indicates she either didn't understand what the  
9 questions were or she didn't really know what she thought about  
09:59 10 them.

11 Q. Okay. And if you'll look again with me at what has been  
12 marked as Joint Exhibit 5, the questionnaire --

13 A. Okay.

14 Q. -- of Ms. Cooper. Did you make any similar notations  
09:59 15 regarding Ms. Cooper regarding her -- what you perceived to be  
16 her intelligence?

17 A. I wrote, "Not too sharp," along with a bunch of other  
18 notes.

19 Q. Okay. And did you strike Ms. Cooper; do you recall?

09:59 20 A. I did.

21 Q. Okay. And was Ms. Cooper, to your knowledge, a minority?

22 A. I don't believe she was.

23 Q. Do you remember?

24 Okay. I'd like to look at Alicia Taylor. And if  
10:00 25 you'll look at your affidavit, which is behind Tab Number 1 in

*Miranda Redirect of Davenport*

10:00 1 Joint Exhibit 1A.

2 A. Tab 1?

3 Q. Yes, ma'am.

4 And it might actually be easier if you pulled the

10:00 5 affidavit out for now and just kind of hold onto it so you

6 don't have to keep looking for it.

7 A. I've got a copy of the affidavit right here.

8 Q. Okay. Okay.

9 A. Okay.

10:00 10 Q. Look at your affidavit, under Ms. Alicia Taylor.

11 A. Okay.

12 Q. And the second thing that you noted in the bullet point

13 was, "Had trouble understanding 'beyond a reasonable doubt.'"

14 And I just wanted to make clear for the Court, was that

10:01 15 something that you put in your affidavit or was that a notation

16 that you made at the time that Ms. Taylor was testifying?

17 A. Those were notes I wrote at the time she was testifying.

18 Q. Okay. Now, yesterday Mr. Gray had you look at the voir

19 dire testimony of Ms. Taylor to see whether the cold record

10:01 20 actually reflected whether she had trouble understanding the --

21 "beyond a reasonable doubt." Do you recall that?

22 A. Yes.

23 Q. Okay. Now, regardless of what we now see when we look at

24 the record, what was your contemporaneous understanding of

10:01 25 Ms. Taylor as you were listening to her testimony?

*Miranda Redirect of Davenport*

10:01 1 A. That she had trouble understanding the concept of "beyond a  
2 reasonable doubt."

3 Q. Okay. And, again, as to the third bullet point, the future  
4 dangerousness, the fact the defendant killed more than one  
10:02 5 person wouldn't help her answer, regardless of what comes  
6 across to us now as we read the cold record, at the time that  
7 you were listening to Ms. Taylor's testimony, what do your  
8 notes indicate that your impression was of her testimony as she  
9 was testifying?

10:02 10 A. From looking at my notes that I wrote as she was  
11 testifying, evidently I didn't think that she would understand  
12 or conform her jury deliberations to "beyond a reasonable  
13 doubt," the "future dangerousness" issue, the Special Issues 1  
14 and 2.

10:03 15 Q. Okay. All right.

16 A. Apparently, it took several pages before she finally said  
17 she could follow the law.

18 Q. Okay. And continuing on with Ms. Taylor, if you'll look at  
19 her voir dire testimony, which I believe is behind Tab Number  
10:03 20 22, and if you'll look with me at Page -- starting on Page 106  
21 of her testimony.

22 Beginning on Line 7, if you -- I'll just give you  
23 one second -- two seconds to read that section of voir dire on  
24 that page and continuing on to the next page to refresh your  
10:04 25 memory before I ask you a couple of questions.



*Miranda Redirect of Davenport*

10:05 1 A. Okay.

2 Q. Okay. Specifically, looking at Page 107, Line 16, what did  
3 Ms. Taylor indicate she would do if, on the penalty phase, the  
4 evidence proved that the answers to the special issue should be  
10:05 5 "yes" but she nevertheless felt that the death penalty was  
6 inappropriate in that case?

7 A. Well, she had just received the information that, if both  
8 those were answered "yes," the death penalty would  
9 automatically be assessed by the Court. And she said, if that  
10:05 10 were the case, paraphrasing, that she could not answer them  
11 "yes," she would answer "no."

12 Q. And that was if she felt that the death penalty was not  
13 appropriate. Is that --

14 A. Well, the question was if you felt like the person  
10:06 15 shouldn't receive the death penalty. She said she would answer  
16 "no" and --

17 Q. Does that cause you concern as a prosecutor?

18 A. That if she felt that if -- wait a minute.

19 The question was, "I'm concerned that this might  
10:06 20 be one of those cases that, even though the evidence and the  
21 law said the answers were 'yes,' that it might be one that you  
22 felt like the person shouldn't receive the death penalty."

23 And she said, "I would answer 'no.'"

24 So, yes, that concerns me as a prosecutor.

10:06 25 Q. Okay. So, going back to an answer that -- and a reason

*Miranda Redirect of Davenport*

10:06 1 that you struck -- or you stated that you struck Ms. Taylor was  
2 that she would just have to feel whether the death penalty was  
3 appropriate. Can you tell us why that concerned you with  
4 relation to this particular juror?

10:06 5 A. Because in this question and answer we just went through,  
6 she felt like it wouldn't be appropriate even if the law said  
7 it should be answered "yes."

8 Q. Okay. Now, if, upon further follow-up questioning,  
9 Ms. Taylor nevertheless indicated that she would, in fact,  
10 follow the law, does this alleviate your concerns regarding her  
11 as a juror?

12 A. No, it doesn't.

13 Q. Okay. Let's look for a second at Ms. Holmes, who I believe  
14 is behind Tab Number 19. Yesterday you were asked a couple of  
10:08 15 questions about the questioning of this juror.

16 First of all, did you question Ms. Holmes during  
17 voir dire?

18 A. Yes, I did.

19 Q. Okay. And I believe one of the indications yesterday was  
10:08 20 that you asked Ms. Holmes questions in a manner that you  
21 necessarily wouldn't have asked of non-minority jurors. In  
22 fact, I think the specific example was, when questioning her  
23 about the burden of proof "beyond a reasonable doubt" -- and  
24 I'm going to be on Page 1220 -- and if you'd start on Line  
10:09 25 20 --

*Miranda Redirect of Davenport*

10:09 1 A. Okay.

2 Q. -- and read that question.

3 The question was regarding your use of the word

4 "just beyond a reasonable doubt." Do you recall that question?

10:09 5 A. Yes.

6 Q. Okay.

7 A. I do.

8 Q. And whether or not, by asking that question, you were, in

9 fact, attempting to lead this juror in a -- in a manner to give

10:09 10 them --

11 MS. MIRANDA: I apologize. I'll withdraw that

12 question.

13 BY MS. MIRANDA:

14 Q. Do you recall that being asked, whether your using the word

10:09 15 "just" was an attempt to lead this juror to a response that

16 would allow you to find a reason to strike them?

17 A. I remember the question.

18 Q. Okay. All right. I would like you to take a look at

19 Ms. Plander's voir dire testimony, which is behind Tab Number

10:09 20 11.

21 Do you recall whether Ms. Plander was a White

22 juror that was seated in this case?

23 A. I believe she was.

24 Q. And if you'll look for me on Page 243, beginning on Line

10:10 25 14.

*Miranda Redirect of Davenport*

1 A. Okay.

2 Q. And can you read that and tell me whether, in fact, you  
3 asked a substantially similar question to a White prospective  
4 juror in this case?

5 A. It's substantially similar, but I used the word "only"  
6 instead of "just."

7 Q. Okay. But that's pretty much the only difference --

8 A. Yes.

9 Q. -- between the questions that you asked?

10 A. Yes.

11 Q. Okay. You were also asked about why you persisted in  
12 questioning Ms. Holmes about the burden of proof after she had  
13 already given apparently satisfactory answers. In particular,  
14 you were asked why you pressed her about the burden of proof in  
15 the penalty phase and this was, again, suggesting that the  
16 questioning was tailored to minority jurors in an attempt to  
17 find a reason to strike them.

18 Do you recall that questioning?

19 A. I think I do, yes.

20 Q. Okay. All right. If you will, turn to Mr. Arndt's voir  
21 dire testimony. And he is behind Tab Number 3, on Page 92 of  
22 his voir dire testimony behind Tab Number 3.

23 Okay. Starting on Line 17, you asked the juror  
24 whether he thought it was fair that the burden of proof was  
25 "beyond a reasonable doubt"; and did he give you a satisfactory

*Miranda Redirect of Davenport*

1 answer to that?

2 A. Yes. I asked if it was fair if the burden of proof by the  
3 State is to prove a person guilty just beyond a reasonable  
4 doubt, and he said "yes."

5 Q. Okay. Again using the word "just"?

6 A. Yes.

7 Q. Okay. And nevertheless, despite this answer, did you not  
8 continue to question him and ask him whether he thought the  
9 death penalty was appropriate in the penalty phase?

10 A. Yes.

11 Q. Okay. And is that substantially similar to the questioning  
12 that you asked Ms. Holmes?

13 A. Yes.

14 Q. Okay. Let's also look at Ms. Wojdyla.

15 MS. MIRANDA: How do you-all say that? I'm sorry.

16 MR. GRAY: "Wojdyla."

17 MS. MIRANDA: "Wojdyla." Okay. That's probably  
18 right.

19 BY MS. MIRANDA:

20 Q. Okay. And hers is behind Tab 16, on Page 445 of her voir  
21 dire testimony. And reading starting in Line 7 and, after you  
22 read that, my question is, again, did you ask this White seated  
23 juror a question substantially similar to the questions that  
24 you asked Ms. Holmes during her voir dire testimony, regarding  
25 whether or not the burden of proof would be -- was fair during

*Miranda Redirect of Davenport*

1 the penalty phase.

2 A. Yes, I agree with you.

3 Q. Okay. Let me just ask this question. Did you, in your  
4 questioning of the venire members in this case, question  
5 minority jurors in a manner differently than the manner in  
6 which you questioned White jurors?

7 A. I don't believe I did.

8 Q. Okay. Did you, in your questioning the venire members in  
9 this case, attempt to trick or mislead minority jurors into  
10 responses that would allow you to strike them?

11 A. No, I did not.

12 MS. MIRANDA: May I have one moment, your Honor?

13 THE COURT: Sure.

14 *(Sotto voce discussion between Ms. Miranda and Mr. Jones.)*

15 BY MS. MIRANDA:

16 Q. All right. I would like for you, if you would, to look at  
17 the testimony of Jacklynn Lyles, which is behind Tab Number 8,  
18 specifically at the bottom of Page 181, going into the top of  
19 Page 182.

20 And to your recollection, was Ms. Lyles selected  
21 to sit on the jury in this case?

22 A. I believe she was the first juror seated and then unseated.

23 Q. Okay. Is there any part of this particular portion of the  
24 voir dire where you asked this juror to maybe explain what  
25 types of cases they feel like capital punishment might or might

*Miranda Redirect of Davenport*

10:16 1 not be appropriate in?

2 A. And you say on Page 181?

3 Q. At the bottom of Page 181, starting with the question on  
4 Line 22.

10:16 5 A. I see. Right. I think Mr. Henderson is asking these  
6 questions about any cases where she thinks capital punishment  
7 might not be appropriate.

8 Q. Okay. So, you're asking her about the types of cases?

9 A. Yes.

10:17 10 Q. Or Mr. Henderson is.

11 A. Yes.

12 Q. I apologize.

13 Okay. If you'll look for me at Ms. Willett,  
14 behind Tab Number 14. And I believe this is your questioning.

10:17 15 On Page 273 of her voir dire testimony, again, at  
16 the bottom of the page, starting with the question on Line 20,  
17 was Ms. Willett asked about the types of capital murder cases  
18 that -- where she felt the death penalty was appropriate?

19 A. Yes.

10:18 20 Q. Okay. And one last one, if you can look at Cheryl  
21 Williamson's voir dire testimony, behind Tab Number 15, Page  
22 20, at the very bottom, Line 25, and then continuing on to the  
23 next page, 21, did you ask this juror a question about what  
24 types of cases in which capital punishment might be  
10:18 25 appropriate?

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10:18

1 A. Mr. Henderson did, yes.

2 Q. I apologize. You didn't actually do the questioning.

3 Okay. If it has been suggested in these

4 proceedings that you only asked minority jurors questions

10:19

5 regarding the types of cases in which capital punishment was

6 acceptable, would that be correct, based on the record that you

7 just saw?

8 A. No, it would not be.

9 Q. Okay. Ms. Davenport, yesterday when you testified, you

10:20

10 indicated that as a prosecutor you might be concerned with an

11 individual of one race identifying with a defendant of the same

12 race. Is that correct?

13 A. Yes, it's a consideration.

14 Q. Okay. Did you in this case strike a minority juror,

10:20

15 whether Hispanic or African-American or any other descent,

16 simply because they were the same race as Mr. Rosales?

17 A. No, I did not.

18 Q. Okay. If that is a concern for you in a case, how do you

19 discern whether or not to strike an individual based on that

10:20

20 concern?

21 A. Well, it would have to be other things besides race.

22 Q. Okay.

23 A. And as you can tell, there were minority members on the

24 jury of both -- three -- at least three different races.

10:21

25 Q. Okay. Okay.



*Miranda Redirect of Davenport*

10:21 1 A. Well, not minority of three races, but three different  
2 races on the jury.

3 Q. Okay.

4 MS. MIRANDA: Your Honor, I believe I'll pass the  
10:21 5 witness at this time.

6 THE COURT: Any re- -- what is it going to be?  
7 Recross, I guess it is, right?

8 MR. GRAY: Your Honor, we just have a very few  
9 questions on issues where we think the record may not be clear.

10:21 10 THE COURT: Okay.

11 MR. GRAY: It will just take a minute.

12 THE COURT: Okay. That's fine.

13 Let's see. What time is it? Can we go?

14 Yeah, let's continue.

10:22 15 MR. GRAY: Okay.

16 THE COURT: Is it just going to be a few minutes?

17 MR. GRAY: I expect so, your Honor, yes.

18 THE COURT: Yeah. Yeah, let's keep going.

19 Can we move the mic on over here?

10:22 20 **RECROSS-EXAMINATION**

21 BY MR. GRAY:

22 Q. Ms. Davenport, do you have an independent recollection of  
23 the demeanor of any of the individual jurors we've been  
24 discussing?

10:22 25 A. I do of one.

*Gray Recross of Davenport*

10:22 1 Q. Who's that?

2 A. I don't remember her name right off the top of my head, but  
3 she was the one that we -- that I made a notation about "Queen  
4 for a Day."

10:22 5 Q. Do you recall the demeanor of any other jurors or their  
6 appearance?

7 A. No, I don't.

8 Q. Hand gestures, tone of voice?

9 A. No. Not unless I made a notation of it.

10:22 10 Q. Ms. Davenport, when the panels of potential jurors were  
11 first brought into the courtroom, could you see the -- could  
12 you observe the appearance of the potential jurors and observe  
13 their race when they first entered the courtroom?

14 A. Well, I'm sure I could.

10:23 15 Q. Could you tell when they first came into the courtroom how  
16 many jurors of color -- potential jurors of color were included  
17 in that panel?

18 A. In those ten people? I'm sure I could.

19 Q. Do you recall, when you made individual handwritten notes  
10:23 20 on the juror materials, the exact time that you made them?

21 A. At the -- the notes I made about -- excuse me -- the person  
22 being questioned was during the time they were being  
23 questioned. When I went through and just circled things or  
24 underlined things, it was probably while they were being  
10:23 25 instructed by the judge before we got to questioning.

*Gray Recross of Davenport*

10:23 1 Q. So, some of your handwritten notes were likely made before  
2 the juror began testifying?

3 A. I didn't say "handwritten notes." I said where I -- where  
4 I underlined or circled things.

10:23 5 Q. I mean, obviously, if the note concerns the substance of  
6 the testimony, it was probably written at the time the person  
7 was testifying. But if it doesn't concern the person's  
8 testimony, do you know whether -- when that note was written?

9 A. It's like I told you. I think it was written during the  
10:24 10 time that they were testifying.

11 Q. Okay. And what's the basis for -- other than what it  
12 discusses testimony, what's the basis for your knowledge of --

13 A. I wouldn't have any reason to write anything prior to the  
14 time they said anything.

10:24 15 I had circled things to ask questions about or to  
16 listen to see if I got answers to without asking questions  
17 about.

18 Q. Do you have information concerning the race of either  
19 Mr. Smith or Mr. Kelley? Do you know what their -- those  
10:24 20 potential jurors races were?

21 A. Do I have information?

22 Q. Yeah. Can we -- can anyone point to the record of --  
23 information which would identify the race of Mr. Smith or  
24 Mr. Kelley?

10:24 25 A. I don't know.

*Gray Recross of Davenport*

10:24 1 Q. Well, the record reflects, to our knowledge, that those two  
2 jurors' race is unidentified.

3 MR. GRAY: And that's all. Thanks.

4 THE COURT: Anything else?

10:25 5 MS. MIRANDA: No further questions, your Honor.

6 THE COURT: All right. Then, I think we are done with  
7 you.

8 THE WITNESS: You're exhausting me.

9 THE COURT: I think we are done with you.

10:25 10 All right. So, is this a good time for a break,  
11 then, lawyers?

12 Let's -- we're going to just take a break, then,  
13 for about -- let's take a break for 15 minutes. And it is  
14 about 10:24, 10:25. So, we will resume about 10:40 this  
10:25 15 morning. Okay?

16 We'll see you guys at 10:40 this morning.

17 *(Recess taken from 10:25 to 10:52 a.m.)*

18 THE COURT: Okay. Please be seated, everybody.

19 All right. Who's our next witness, please?

10:52 20 Mr. Rosales, you with us?

21 MR. ROSALES: Yes, ma'am.

22 THE COURT: All right.

23 MR. ROSALES: Yes, ma'am.

24 THE COURT: All right. Who's our next witness,  
10:52 25 please?

*Gray Recross of Davenport*

10:53 1 MS. SWARNS: Our next witness is going to be Craig  
2 Washington, who has not arrived yet. He is on his way. We  
3 have called him; and we are told that he is, literally, in  
4 transit.

10:53 5 THE COURT: Who else do you have, then?

6 MS. SWARNS: We have no questions for Mr. Henderson;  
7 so, Mr. Washington will be our last witness.

8 THE COURT: Oh, you're not presenting -- I thought he  
9 was on your witness list.

10:53 10 MS. SWARNS: Yes, he is. But after consultation, we  
11 decided that we have no cross-examination for Mr. Henderson.

12 THE COURT: Oh. Were you guys going to -- well, you  
13 already had your examination of Mr. Henderson, I guess.

14 MS. MIRANDA: Yes.

10:53 15 THE COURT: All right.

16 MS. MIRANDA: May I tell Mr. Henderson he can go home?

17 THE COURT: Pardon me?

18 MS. MIRANDA: May I tell Mr. Henderson he can go home?

19 THE COURT: Oh, is he outside?

10:54 20 MS. MIRANDA: Yes.

21 THE COURT: Yes. Yes, you can go ahead and let him  
22 go.

23 No, no. Stop. Before you do that, let me just  
24 ask a question at this stage of the proceedings that would be  
10:54 25 helpful to me. This is something that I would have saved

*Gray Recross of Davenport*

10:54 1 for -- this is something I would have saved for, you know,  
2 summation; but let me just ask this question just sort of to  
3 clarify this in my own mind.

4 In the cross-examination, I guess, of  
10:54 5 Ms. Davenport, she was asked about many jurors in terms of --  
6 she was asked about questions posed to one juror and then she  
7 was asked about questions posed to another juror that were in  
8 the similar vein, a number of times, all throughout the course  
9 of the questioning.

10:54 10 One thing that, because it was going kind of  
11 fast, that I wasn't able to discern or make note of was this.  
12 In each of the instances in which you asked her questions about  
13 one witness and then flipped and we asked a similar question  
14 about another witness, was Ms. Davenport the prosecutor who was  
10:55 15 asking questions in both instances?

16 MR. GRAY: For the jurors that we discussed?

17 THE COURT: Yes, for all the jurors that we discussed  
18 over the last two days.

19 MR. GRAY: We discussed all of the Batson jurors in  
10:55 20 this matter.

21 THE COURT: Right.

22 MR. GRAY: Ms. Holmes and Mr. Deen were questioned by  
23 Ms. Davenport.

24 THE COURT: Hold on a second, then. Hold on a second.

10:55 25 MR. GRAY: And I've got a list, and I can tell you for

*Gray Recross of Davenport*

1 sure who was questioned by whom.

2 THE COURT: Okay.

3 MR. JONES: I can tell.

4 MS. SWARNS: Here we go. I've got it.

5 THE COURT: Okay. Holmes and Deen were both by  
6 Davenport.

7 MR. GRAY: So, for the -- Hamilton, Mr. Hamilton was  
8 questioned by Ms. Davenport.

9 Why don't I just go through the list in the order  
10 in which they were questioned?

11 THE COURT: No. No. That's not helpful to me.

12 MR. GRAY: Okay. So --

13 THE COURT: Listen to my question. This is what I  
14 want to know. In the instances in which we looked at the  
15 testimony of jurors and we compared one set of answers -- for  
16 instance, the answers on whether or not they would be able to  
17 make a decision on their own even if 11 other people were  
18 against them and the questions on whether or not they would  
19 require the defendant to testify or not and other similar  
20 comparisons that we made over the last two days, in each of  
21 those instances in which you did a comparison -- was  
22 Ms. Davenport the prosecutor asking questions of that juror, in  
23 each of those instances?

24 You've got your categories there. I just don't  
25 have them in front of me. You know what I'm talking about.

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10:56 1 MR. GRAY: Thank you for repeating your question, your  
2 Honor.

3 Ms. Plander was questioned by Ms. Davenport.

4 THE COURT: And who --

10:56 5 MR. GRAY: Ms. Willett was questioned by  
6 Ms. Davenport. Ms. Wojdyla was --

7 THE COURT: Hold on. Hold on. Stop, stop, stop,  
8 stop, stop.

9 Plander and Willett, were those two that we  
10 compared together?

11 MR. GRAY: Those are two seated White jurors that we  
12 compared to several of the Batson jurors.

13 THE COURT: Who did you compare them to?

14 MR. GRAY: Well, I think Ms. Plander and Ms. Wojdyla,  
10:57 15 Ms. Walker, Ms. Holmes, and Ms. Taylor.

16 THE COURT: I'm sorry. Slow down.

17 Ms. Plander did what, now? Say it again.

18 MR. GRAY: I would have to go back to my notes to be a  
19 hundred percent correct.

10:57 20 THE COURT: Okay. Go back to your notes, and help me  
21 out before I let -- before I decide if I'm letting  
22 Mr. Henderson go.

23 I mean, you have it by category. It's not like  
24 I'm asking you to do something that would be very difficult for  
10:57 25 you to do. There were certain issues that you were



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10:57 1 specifically focused on, and you compared two jurors to each  
2 other. So, help me out on those now.

3 MR. GRAY: Actually, could I take a minute to do this  
4 on paper and give you an answer that I'm confident is right?

10:58 5 THE COURT: Okay.

6 *(Sotto voce discussion between Court and staff)*

7 MR. GRAY: Your Honor?

8 THE COURT: Yes, sir.

9 MR. GRAY: Sorry to interrupt.

11:01 10 THE COURT: Okay.

11 MR. GRAY: For the jurors who were questioned by  
12 Ms. Davenport --

13 THE COURT: Right.

14 MR. GRAY: -- the comparisons that -- to seated jurors  
11:01 15 who she questioned during voir dire and who were accepted and  
16 seated --

17 THE COURT: Okay. I'm ready.

18 MR. GRAY: -- are Ms. Plander --

19 THE COURT: And?

11:01 20 MR. GRAY: -- Ms. Willett and Mr. Arndt --

21 THE COURT: And who?

22 MR. GRAY: -- all of whom were questioned by --

23 THE COURT: I'm sorry. I didn't hear the last one.

24 MR. GRAY: A-R-N-D-N-T -- or N-D-T. Excuse me.

11:01 25 THE COURT: So, Ms. Davenport questioned Ms. Plander,

*Gray Recross of Davenport*

1 Willett, and Arndt that were seated?

2 MR. GRAY: That's correct. Correct. And those were  
3 all comparisons to Ms. Holmes, whom Ms. Davenport also  
4 questioned.

5 THE COURT: And what about Deen? I thought you  
6 said --

7 MR. GRAY: Deen was questioned by Ms. Davenport and a  
8 comparison was Ms. Wojdyla, who was also questioned by  
9 Ms. Davenport.

10 THE COURT: How do you spell "Wojdyla" again? I know  
11 it's spelled two different ways, it's written one way and  
12 spelled another way.

13 MR. GRAY: W-O-J-D-Y-L-A.

14 THE COURT: W-O --

15 MR. GRAY: -- J-D-Y-L-A.

16 THE COURT: Was also by Ms. Davenport.

17 What about Hamilton? You got ready to say  
18 something about Hamilton.

19 MR. GRAY: Hamilton was also questioned by  
20 Ms. Davenport.

21 THE COURT: Okay.

22 MR. GRAY: And a comparison -- the comparison -- one  
23 of the comparisons that we did with Ms. Hamilton was  
24 Ms. Willett and -- who was also questioned by Ms. Davenport.

25 THE COURT: Did you ask Ms. Davenport this morning

*Gray Recross of Davenport*

11:02 1 about any -- today or yesterday, about any comparison between  
2 jurors that she -- where she was not responsible for  
3 questioning one juror or the other?

4 MR. GRAY: Yes, your Honor.

11:02 5 THE COURT: Who was that?

6 MR. GRAY: The Batson jurors would be Ms. Taylor, who  
7 was questioned by Mr. Henderson; Ms. Walker, who was questioned  
8 by Mr. Henderson; and Ms. Lopez, who was questioned by  
9 Mr. Henderson.

11:03 10 MR. JONES: Excuse me. I believe Trevino was also  
11 discussed, was he not?

12 THE COURT: Yes.

13 MR. JONES: Who was also by Mr. Henderson.

14 MR. GRAY: Yes.

11:03 15 Mr. Saenz was also questioned by Ms. Davenport,  
16 but there was no comparison juror in my questioning.  
17 Mr. Saenz, there was only one point briefly discussed there,  
18 your Honor.

19 THE COURT: So, I have, by Davenport, Holmes, Deen,  
11:03 20 Hamilton, Wojdyla, Plander, Willett, and Arndt, in terms --

21 MR. GRAY: That's correct.

22 THE COURT: -- of the jurors we discussed over the  
23 last couple of days.

24 And by Henderson, Taylor, Walker, Lopez, and  
11:04 25 Trevino.

*Gray Recross of Davenport*

11:04 1 MR. GRAY: Yes.

2 MS. MIRANDA: Your Honor, if I may, I believe there

3 was also a comparison made to Seated Juror Williamson, who was

4 questioned by Mr. Henderson.

11:04 5 MS. SWARNS: That's correct.

6 THE COURT: Williamson.

7 MS. SWARNS: We're just going to confirm, your Honor,

8 whether there were any more comparables by Mr. Henderson.

9 THE COURT: Okay.

11:05 10 MS. SWARNS: We think also Jacklynn Lyles was a

11 comparison, that was questioned by Mr. Henderson.

12 THE COURT: Lyles?

13 MS. SWARNS: Uh-huh. And that --

14 THE COURT: Is that it, then?

11:06 15 MS. SWARNS: I'm sorry, your Honor.

16 THE COURT: Hold on one second.

17 *(Sotto voce discussion between Court and staff)*

18 THE COURT: All right. Did you have something else?

19 MS. SWARNS: Just one more, your Honor.

11:09 20 THE COURT: Yes.

21 MS. SWARNS: Bethel Nickles was questioned by

22 Ms. Davenport. She was a comparison juror.

23 THE COURT: Nickles?

24 MS. SWARNS: N-I-C-K-L-E-S.

11:09 25 THE COURT: N-I-C --

*Gray Recross of Davenport*

11:09 1 MS. SWARNS: -- K-L-E-S.

2 THE COURT: Oh, Nickles, that way. Okay.

3 Okay. All right. All right, then. Then, we'll

4 just go on with the next witness if we're not going to call

11:09 5 Mr. Henderson, if that is the petitioner's choice and decision.

6 I understand -- Mr. Henderson is here and

7 available, but the petitioner does not want to call him live as

8 a witness. Is that correct?

9 MS. SWARNS: That's correct, your Honor.

11:10 10 THE COURT: All right. All right. Who's our next

11 witness then, please?

12 MS. MIRANDA: May I go let Mr. Henderson know that

13 he's free to go?

14 THE COURT: Oh, yes, yes, yes. I'm sorry. That's

11:10 15 right. You asked me that already, and I had forgotten.

16 *(Ms. Miranda leaves the room.)*

17 THE COURT: Did we move of microphone over?

18 MS. SWARNS: The microphone is here.

19 THE COURT: Okay. Great.

11:10 20 Did she have to go to another floor to find

21 Mr. Henderson?

22 MR. JONES: No. She's just right outside the door.

23 THE COURT: Okay.

24 MR. GRAY: Your Honor, would you like me to call

11:10 25 Mr. Washington?

*Gray Recross of Davenport*

11:10 1 THE COURT: Well, let's wait until she comes back. I  
2 didn't know if -- that's why I was asking where did she have to  
3 go to find Mr. Henderson.

4 *(Ms. Miranda and Mr. Washington enter the room.)*

11:11 5 THE COURT: Are we ready now?

6 MS. SWARNS: Yes.

7 MR. WASHINGTON: Oh, next to the judge?

8 THE COURT: Yes, absolutely. You get the hot seat.

9 MR. WASHINGTON: Good morning, your Honor.

11:11 10 THE COURT: Good morning. Good morning.

11 This is the only place where Mr. Rosales can  
12 actually see you, as well; and I didn't think that in a setting  
13 like this that Mr. Rosales should not have the opportunity to  
14 see and hear the witnesses.

11:11 15 MR. WASHINGTON: Yes, your Honor.

16 THE COURT: All right. You ready to be sworn, please?

17 Hello?

18 A CLERK: I'm sorry.

19 Do you solemnly swear the testimony you will give  
11:11 20 in the case now before the Court will be the truth, the whole  
21 truth, and nothing but the truth, so help you God?

22 MR. WASHINGTON: So help me God.

23 A CLERK: Thank you.

24 **CRAIG WASHINGTON, DULY SWORN, TESTIFIED:**

11:11 25 **DIRECT EXAMINATION**

*Swarns Direct of Washington*

1 BY MS. SWARNs:

2 Q. Good morning, Mr. Washington.

3 A. Good morning.

4 Q. Can you state your name for the record and spell your last  
5 name?

6 A. My name is Craig Anthony Washington, W-A-S-H-I-N-G-T-O-N.

7 Q. And in what county do you reside, Mr. Washington?

8 A. Harris.

9 Q. And how long have you lived in Harris County?

10 A. Since December of 1941.

11 Q. What's your current occupation?

12 A. I'm a lawyer.

13 Q. What is your practice of law?

14 A. It's a general practice, but about 90 percent of my time is  
15 spent defending people charged with crimes.

16 Q. How long have you been a practicing attorney?

17 A. Since December the 15th -- I was licensed on December the  
18 15th, 1969. I began my practice on February 1st of 1970.

19 Q. And where did you go to law school?

20 A. I went to Thurgood Marshall. It was then called Texas  
21 Southern University Law School.

22 Q. Okay. When did you graduate from law school?

23 A. I graduated in 1969.

24 Q. While you were in law school, did you earn any awards or  
25 distinctions?

*Swarns Direct of Washington*

11:13 1 A. Yes, several. I can't remember. It's been too long ago.  
2 Some American Jurisprudence prizes and Westlaw, something for  
3 senior with the best average, Who's Who Among Students in  
4 College --

11:13 5 Q. I think you're going to have to speak up --

6 A. I'm sorry.

7 Q. -- for the court reporter.

8 A. I can't remember all of them. There's --

9 Q. All right.

11:13 10 A. I think I won nine AmJur awards: Evidence, Constitutional  
11 Law, Criminal Law, Ethics, Administrative Law.

12 Q. Do you remember what number rank you graduated?

13 A. I was number one in my class.

14 Q. What did you do after you graduated from law school?

11:13 15 A. I was assistant dean of the law school for one semester,  
16 the fall semester of 1969.

17 Q. And then?

18 A. Then I entered private practice in 1970.

19 Q. Have you held any elective offices?

11:13 20 A. I have.

21 Q. What were those?

22 A. I was a member of the Texas House of Representatives from  
23 January of 1973 until January of 1983.

24 I was a member of the Texas Senate from January  
11:14 25 of 1983 until December the 9th, I believe it was, of 1989. On



*Swarns Direct of Washington*

11:14 1 that day, I was elected to be a representative in the Congress  
2 of the United States to represent the 18th District, where I  
3 served from December 9th of 1989 until January of 1994.

11:14 4 Q. And did you maintain your law practice while you were in  
5 the legislature?

6 A. When I was in the State legislature, yes, ma'am, I did.

7 Q. Okay. And over your career, did you always practice  
8 criminal law?

9 A. I've always practiced criminal law.

11:14 10 Q. And what percentage, over your career, of your practice has  
11 been criminal law?

12 A. It's always been the majority. When you start out like I  
13 did, you specialize in what the comes in the door most often.  
14 And I practiced a lot of juvenile law. I became very  
11:14 15 interested in that field. So, it's quasi -- it's a quasi  
16 civil, quasi criminal allegations.

17 And I did that along with the criminal cases -- I  
18 would say the lowest point was probably about 60 percent  
19 criminal and highest probably about where it is now, about 90  
11:15 20 to 95 percent criminal.

21 Q. Okay. Where do you hold licenses to practice law?

22 A. I'm licensed by the Supreme Court of the State of Texas.

23 I'm also licensed to practice in the United States District

24 Court for the Southern District, the Northern District, the

11:15 25 Eastern District, and the Western District of the districts of

*Swarns Direct of Washington*

1 Texas; United States Court of Appeals for the Fifth Circuit;  
2 and the United States Supreme Court.

3 Q. In 1995 were you honored by the State Bar of Texas as the  
4 Outstanding Criminal Defense Lawyer of the Year?

5 A. Yes, ma'am, I was.

6 Q. Okay. Do you practice in Harris County?

7 A. I do.

8 Q. How long have you practiced in Harris County?

9 A. Since February 1st of 1970.

10 Q. Okay. And how many criminal cases have you tried?

11 A. Probably close to a thousand. Seems like an awful lot, but  
12 it's probably close to a thousand.

13 Q. How many death penalty cases have you tried?

14 A. I believe it's either nine or ten to verdict. I've handled  
15 others that didn't go to trial, and I've handled appeals on two  
16 that I didn't try.

17 Q. And the ten that went to verdict, were those to juries?

18 A. Yes, ma'am, they were.

19 Q. And were those in Harris County?

20 A. I believe eight of them were in Harris County. I recall  
21 one in Brazos County and one in Liberty County, but I believe  
22 all the other death penalty cases that I've handled have been  
23 in Harris County.

24 Q. During your -- from your experience in capital cases, in  
25 trying capital cases, have you ever noticed any patterns in the

*Swarns Direct of Washington*

1 way that Harris County prosecutors use peremptory challenges?

2 A. You would have to be a bit more specific. I've noticed  
3 several different patterns on several different aspects of  
4 criminal cases.

5 Q. Okay. What patterns have you noticed? Just give a list.

6 MS. MIRANDA: Your Honor, I'm going to object at this  
7 point to -- to limiting it to those issues or whatever patterns  
8 are relevant.

9 I mean, I understand what you're trying to do;  
10 and we're not going to object to it but --

11 THE COURT: Okay.

12 MS. MIRANDA: -- you know, I mean, just kind of --

13 THE COURT: Well, let me hear what he has to say. We  
14 can narrow it down after we kind of get --

15 MS. MIRANDA: Okay.

16 THE COURT: -- what they are. Who knows what they are  
17 at this point in time?

18 MS. MIRANDA: Okay.

19 A. I've noticed during -- in the cases that I've tried, the  
20 ones that I've had the first person singular experience of  
21 participating in and watching, the assistant district  
22 attorneys, both in capital and non capital cases, would  
23 endeavor to eliminate as many minorities from the jury as they  
24 could.

25 BY MS. SWARNS:

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11:18 1 Q. And what vehicle did they use to eliminate as many minority  
2 prospective jurors as they could?

3 A. Attempting to get the venire person to disqualify herself  
4 and himself on some aspect of the case, other than to have to  
11:18 5 use a challenge, a peremptory challenge, challenges for cause.

6 I noticed that they would approach -- "they"  
7 meaning the assistant district attorneys in my cases -- would  
8 approach the questioning of minority persons in a different way  
9 than they did people who were not of the minority persuasion,  
11:19 10 in an attempt to get them to disqualify themselves on some  
11 reason that would prevent them from having to use a peremptory  
12 challenge on them.

13 Q. Was it -- in your experience, did the Harris County  
14 prosecutors use a disproportionate number of their peremptory  
11:19 15 challenges against people of color?

16 A. Whenever they were on the panel and available, if they  
17 couldn't get them for cause, then they would use a  
18 disproportionate number of peremptory challenges on minority  
19 persons, yes.

11:19 20 Q. And in your experience, did the Harris County prosecutors  
21 use those strikes to exclude otherwise acceptable or eligible  
22 African-Americans and Hispanics?

23 A. They would be acceptable in that they would have passed the  
24 muster or the qualification which eliminated a basis for  
11:20 25 challenging them for cause. So, they would be acceptable as

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11:20 1 jurors, except that they would use a peremptory challenge upon  
2 them.

3 Q. And did they use peremptory challenges to exclude potential  
4 jurors of color who you perceived to be -- have offered  
11:20 5 responses that were favorable to the State?

6 A. Yes. In some instances, they were some of the, if you  
7 could -- it's kind of lawyer talk, but they would be strong as  
8 mustard seed, in my opinion. I would be -- frankly, a couple  
9 of the cases I can recall, I would have stricken them myself  
11:20 10 except that I knew the State was going to use a strike on them  
11 and they had to go first.

12 Q. How did you know the State was going to use a strike on  
13 them?

14 A. Because they were Black or Hispanic.

11:20 15 Q. So, in your experience, did you withhold a peremptory  
16 challenge or did you know that you didn't have to use a  
17 peremptory challenge because the State was going to use one?

18 A. Well, it never came to that because under the State system  
19 they have to declare -- the State has to declare its intentions  
11:21 20 first. The venire person is examined by the Court and then by  
21 the prosecution and then by the defense.

22 In many instances, you could tell from the -- the  
23 way they were asking the questions that they were going to --  
24 they were going to -- they wanted to get rid of the juror by  
11:21 25 whatever means were necessary. And, so, basically, you could

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1 relax and not have to spend a lot of time rehabilitating or  
2 preparing the witness to be a potential juror.

3 For instance, if I know a person is going, I  
4 could spend another 30 minutes with that person, talking about  
5 empowerment; if you get to be a juror, having your own opinion;  
6 mitigation; whatever the factors were. But basically, in a lot  
7 of instances, I wouldn't have to waste my time on that because  
8 you can -- you can close your eyes and -- without even knowing  
9 what race the person is, and you can tell whether the  
10 prosecution is trying to eliminate them by some other means.

11 And if they're trying to eliminate them on a --  
12 for cause, then you can pretty much bet that if the cause  
13 attempt fails that they're going to exercise a peremptory on  
14 them; so, I can kind of save my jaws from moving a lot.

15 Q. So, you tailored the extent to which you questioned venire  
16 persons of color, based on your experience with the Harris  
17 County prosecutors?

18 A. Sometimes, I did. Sometimes, I didn't. Sometimes, you  
19 know, you get angry and you want to make a full record because  
20 you get tired of seeing it.

21 Lawyers have to go around preaching how fair the  
22 system is and how fair the system should be. I don't think any  
23 real lawyer would want anything less than a fair trial for  
24 everybody concerned. And we are the -- we're the advocates for  
25 the judicial system. If we don't believe in it, then the

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1 people aren't going to believe in it.

2 And I'd had the dual responsibility of being a  
3 representative, a spokesman for people and going about the  
4 community, convincing people that the concept of ordered  
5 liberty means something, that it works for people.

6 And it hurts your heart when you see all the  
7 Black people get up and have to leave the courtroom because the  
8 DA won't accept them as jurors. It makes my job hard, to go  
9 back out in the community and say, "Don't take to the streets.  
10 Believe in the judicial system and it works."

11 Q. Was it one occasion that you saw these kind of patterns or  
12 was it more than one occasion, in your experience?

13 A. Unfortunately, it was too many occasions.

14 Q. Was it the majority, was it -- can you give a percentage of  
15 times during your capital and non-capital trial experience that  
16 you saw these patterns of strikes when questioning?

17 A. Well, because I tried many more non-capital cases than  
18 capital cases, it would have been -- an advanced majority of  
19 situations would have been in non-capital cases.

20 And it wasn't -- it wasn't always like that. I  
21 mean, every once in awhile -- well, first of all, if there were  
22 15 Black people on the panel, then you'd get a different kind  
23 of an inquiry because you can't strike them all. And, so, the  
24 prosecutors' tactics were different because the perception  
25 would be, if you struck ten Black people and you left five,

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11:24 1 that those ten -- those five who were left are not going to be  
2 stupid about the fact that the prosecutor struck ten. So, the  
3 methodology would change then.

4 They would use a different approach altogether  
11:24 5 and, in their view, I guess, get the ones that were most  
6 acceptable to them, which there's nothing wrong with. But if  
7 you had five, six, or seven, they're going to strike them all.  
8 Q. And was it more common to have five, six, or seven or was  
9 it more common to have 15 people of color?

11:25 10 A. Unfortunately, it's more common to have five, six, or seven  
11 and most often not even that many.

12 Q. Do you recall specific case examples of when something like  
13 this occurred in your practice?

14 A. I can recall two. There was the State of Texas versus  
11:25 15 Calvin Joseph Williams and the State of Texas against Sammy  
16 Phelps, Jr., P-H-E-L-P-S.

17 Q. And can you tell -- describe for the Court what happened on  
18 those cases?

19 A. It's been a long time ago, and I sometimes get the two  
11:25 20 confused. Sammy Phelps was charged with a capital offense for  
21 a murder committed during a burglary that occurred in the  
22 Montrose area of Houston. Or Calvin Joseph Williams. I think  
23 I said -- maybe I said Sammy Phelps. Calvin Joseph Williams  
24 was charged with a murder committed during a burglary in the  
11:26 25 Montrose area.



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11:26 1 Sammy Phelps Jr. was charged with a murder  
2 committed during a burglary at night, also in the Montrose area  
3 now that I think about it. The distinction on that case, it  
4 was based entirely upon circumstantial evidence with one  
11:26 5 fingerprint and was at one time the leading case on fingerprint  
6 identification in Texas.

7 But in the Phelps case, I recall that Jack  
8 Bodisford -- Bodisford -- may he rest in peace -- was the chief  
9 prosecutor. And he was assisted by Ed Dodd, D-O-D-D, also  
11:26 10 deceased, may he rest in peace. And it was tried in the  
11 133rd -- 83rd district court. Joseph Guarino was the judge.

12 MS. MIRANDA: Your Honor, at this point I'm going to  
13 object to this portion since he's established that neither the  
14 two prosecutors at issue in this case were at issue in that  
11:27 15 case.

16 THE COURT: Overruled.  
17 A. There was a man, whose name I cannot remember, an  
18 African-American man, who presented himself for jury selection.  
19 And he was questioned by Mr. Dodd at length. And on a scale of  
11:27 20 one to ten, on the death penalty alone, he was probably a 12,  
21 very, very strong on the death penalty, almost to the point  
22 where it would make the hair stand up on the back of your neck.  
23 And I had hair then.

24 I was very concerned about him because, frankly,  
11:28 25 it put me in sort of a dilemma. Here, I had been advocating

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11:28 1 all my life for inclusion; and I was faced with the aspect of  
2 perhaps having to exercise a peremptory challenge on this  
3 person.

4 At any rate, at the end of the examination -- he  
11:28 5 was examined by Mr. Dodd and then either by myself or Larry  
6 Sauer, S-A-U-E-R, who was my co-counsel. We passed him back  
7 after examination on a whole panoply of issues, including death  
8 penalty qualifications.

9 You also had to use your one turn at bat to talk  
11:28 10 about every aspect of the case, burden of proof and all those  
11 things, whatever it was that you wanted to examine the person  
12 about as to their ability to follow the law. Then you passed  
13 him back; and the judge says, "What says the State?" And then,  
14 if the State accepts the juror, then it passes to the defendant  
11:29 15 for a peremptory challenge; and he says, "What says the  
16 defendant?"

17 And I'm holding my breath, waiting for Ed Dodd to  
18 accept this juror, which, in my experience, would have been the  
19 first time that a Black person had been allowed to sit on a  
11:29 20 death penalty case where there was -- at least in my experience  
21 and especially where there was a Black defendant and an  
22 Anglo-Saxon victim.

23 BY MS. SWARNs:

24 Q. What year was this case?

11:29 25 A. I don't know. Eighty something. It was in 183rd District

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11:29 1 Court. And it was appealed; so, there's a record on -- he  
2 received a life sentence and -- so, there's a recorded case. I  
3 just, frankly, don't remember.

4 Anyway, Mr. Botteford struck him -- I mean,  
11:30 5 Mr. Dodd struck him. And it made me very, very, very, very,  
6 very, very angry for a number of reasons.

7 First of all, because Mr. Dodd was from  
8 Connecticut and I thought that he was a different kind of White  
9 guy than the homegrown people that I sometimes found to be  
11:30 10 prejudiced. I didn't think that he was a prejudiced man.

11 But he demonstrated by not accepting that juror,  
12 at least in my opinion, that he was a prejudiced man; and I had  
13 taken him for something else. And it hurt my feelings more  
14 than anything that I had not evaluated him properly as a human  
11:30 15 being.

16 And I don't remember whether he smoked or not,  
17 but I did. And we went outside the courthouse, and we happened  
18 to come upon each other out on the sidewalk. And I was so  
19 furious that I let my guard down and told him how I felt, which  
11:30 20 I don't usually do as a lawyer.

21 And he apologized to me and said that Jack  
22 Botteford told him to strike the man, the significance of which  
23 was that Jack Botteford got up and left the room when the man  
24 was seated and did not hear one answer to one question asked by  
11:31 25 either side. So, I knew that Jack Botteford told him to strike

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11:31 1 him because he was Black. That was the only thing that Jack  
2 Botteford knew about him other than what was on his  
3 questionnaire.

4 And he apologized to me for striking him. We  
11:31 5 went back in the courtroom, and I made him say that on the  
6 record. I called him as a witness. And that is part of the  
7 record in this case. You don't have to take my word for it.  
8 His testimony is there.

9 He became angry with me because he told me off  
11:31 10 the witness stand that I breached a confidence. And I didn't,  
11 because you don't have a confidence where a man lied to the  
12 State. He shouldn't have told me if he didn't want me to know.

13 But there's a record of him testifying that Jack  
14 Botteford told him to strike that man. I can't remember the  
11:31 15 man's name, but I remember the incident like it happened to me  
16 yesterday.

17 Q. And you also mentioned a case of Mr. Williams?

18 A. Calvin Joseph Williams. They struck all -- I don't  
19 remember as vivid an incident, but I remember that there was a  
11:32 20 soliloquy by me that went on for probably 20 or 30 pages. And  
21 this was during Swain against Alabama, where I just was fed up  
22 with it. And I just let them have it as to my feelings about  
23 it.

24 And this is a record, too. I saw it, because I  
11:32 25 did a directed appeal on Mr. Williams; and I kind of smiled to

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11:32 1 myself but -- I think it embodies at least my sense of  
2 fairness, that you don't -- you can't call a system fair where  
3 you systematically exclude any group of people because of who  
4 they are.

11:32 5 Q. And just so the record is clear, those are not the only two  
6 instances you saw this in a capital case?

7 A. No. Those are the ones that come to mind most often.

8 Happened in other counties, too; but you're  
9 speaking of Harris County. And I don't recall that there ever  
11:32 10 was a Black juror on a capital case that I tried in Harris  
11 County, in State Court.

12 Q. Okay. Did you notice whether the patterns of strikes and  
13 questionings by the Harris County prosecutors changed based on  
14 the race or whether the race of the defendant affected the  
11:33 15 extent to which the prosecutors struck prospective jurors of  
16 color?

17 A. My personal experience is -- all of the clients that I  
18 represented who were charged with a death offense were Black.  
19 And I don't remember if there were many times when the death  
11:33 20 penalty was sought where a victim wasn't Black.

21 Almost all of the cases I'm aware of, the State  
22 reserved the death penalty for Black people who killed White  
23 people or people -- or minority people who killed White people.  
24 Very seldom -- I don't know of a case -- I have no personal  
11:33 25 experience with a case where a defendant killed another Black

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1 person and was charged with a death penalty offense.

2 I have many of them where a defendant killed  
3 another Black person, and they may have been death eligible  
4 after Furman was decided and after the legislature reenacted,  
5 when I was there, a death penalty in Texas.

6 But I don't recall an instance in which the State  
7 of Texas, through the district attorney of Harris County,  
8 sought the death penalty in the instance of a Black killing  
9 another Black person.

10 Q. In your experience, did the Batson decision in 1986 -- was  
11 there a change or did the manner in which the State exercised  
12 its strikes change, before 1986 as compared to after 1986?

13 A. Well, it changed after -- after Batson was decided by the  
14 Supreme Court in -- I believe it was in April, March or April  
15 of 1986. It changed somewhat.

16 Q. Did it get better or worse after that?

17 A. It got -- it got better.

18 I passed a bill in the legislature that set up  
19 the provisions in the Texas Code of Criminal Procedures that  
20 outlines a procedure that must be followed when a Batson  
21 challenge is made, attempting to make it standardized so it  
22 wouldn't be a case by case, judge by judge system of reacting  
23 to what they felt was a prima facie case.

24 The statute is clear just -- it still depends  
25 upon the subjective reasoning of the judge to decide whether a

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1 pretext has been established and whether a neutral non-racially  
2 motivated reason has been established for striking a juror  
3 peremptorily.

4 Q. You indicated that you observed these disparate questioning  
5 and the striking of African-Americans in your own trials. Did  
6 you ever have occasions to watch colleagues try cases and see  
7 this kind of pattern occur in other colleagues' cases?

8 A. There's several other times. But most of the time, I  
9 mean -- it wouldn't be like I would sit through a whole jury  
10 selection process. But there were other colleagues trying  
11 cases, that I had an affinity for, wanted to learn something  
12 from, frankly; so, I would go sit and watch some.

13 I can't say that I ever watched another voir dire  
14 examination in another capital case from beginning to end. But  
15 I would selectively watch from time to time other persons who  
16 were picking juries in capital cases. And I saw no difference  
17 in the pattern that I have perceived.

18 And mine was a legislative reason in addition to  
19 my -- my goal as a lawyer. I introduced an awful lot of bills  
20 in the legislature, trying to make the criminal justice system  
21 equitable. And that included some empirical data on watching  
22 other people try cases. So, it wasn't just my personal  
23 experience that I was relying upon when I introduced bills to  
24 try to change the system and prevent what I thought was a gross  
25 injustice.

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11:36 1 Q. Okay. And have you had -- in those years before Batson,  
2 did you have conversations with other criminal defense  
3 attorneys about this phenomenon of the use of peremptory  
4 challenges against prospective jurors of color?

11:37 5 A. Yes. I think there was even a Supreme Court case in which  
6 I was cited, regarding some experiences I had had, by Mr. --  
7 Justice Marshall, about the pattern of selecting juries in  
8 Harris County.

9 Q. Right. And that was -- you're referring to your testimony  
11:37 10 in --

11 A. Harris versus Texas, I believe was the style of the case.

12 Q. Exactly.

13 Okay. And you mentioned, as a part of your job  
14 as a legislator and I guess a community member, you spoke  
11:37 15 outside -- you spoke about it in the larger community, about  
16 this issue of exclusion of African-Americans?

17 A. Yes.

18 Q. Can you talk a little about that?

19 A. Well, several things occurred to me. First of all, that  
11:37 20 the number of persons who presented themselves in a panel was  
21 disproportionately low because -- I started practicing in the  
22 Seventies. So, either in the Seventies or the early Eighties  
23 when I noticed the pattern, it was my view that the number of  
24 minorities who were called for jury service and who showed up  
11:38 25 was disproportionately low.



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11:38 1 Because the single source that was used in Harris  
2 County to select jurors was the voter registration roll, but  
3 the statute that determines qualifications for jury service  
4 does not mention being a registered voter as a qualification.  
11:38 5 It was just a handy way of short-circuiting the system to find  
6 an available list of people.

7 So, I introduced bills in the legislature,  
8 probably ad nauseam as far as my colleagues were concerned, to  
9 require the supplementation -- to require other sources, such  
11:39 10 as identifiable utility rolls, driver's license rolls, and  
11 other sources, to supplement the voter registration rolls so  
12 that you would have more people.

13 Because it was well known then and is now, the  
14 minorities who are eligible to register to vote register at a  
11:39 15 disproportionately lower rate than does the majority community,  
16 especially Hispanics and Blacks.

17 I'm not sure that's true of Asians. I never --  
18 the patterns of -- the sizeable number of Asians in this  
19 community was much smaller back in the Seventies and Eighties,  
11:39 20 before the end of Vietnam and the refugees coming over and many  
21 settling in Texas and the like.

22 But I focused on Hispanics and African-Americans,  
23 and it was clear through empirical data that they registered to  
24 vote at a disproportionately lower rate. So, I tried different  
11:40 25 artifices to increase the numbers who would be in the pool.

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11:40 1 Therefore, if you can get a larger number in the pool, then, if  
2 you get to the courtroom and that segment of the community --  
3 say it's 20 percent among each. That would be 40 percent. And  
4 if you end up with 10 percent in the pool, then you have a  
11:40 5 right to complain that something is wrong with the call process  
6 by bringing them to the courtroom.

7 But the idea is, if you increase the number in  
8 the pool, then you're going to increase the number that show up  
9 in the courtroom; and then you're going to decrease the  
11:40 10 likelihood that the district attorney would be able to strike  
11 them all, which means that they'll change their pattern of  
12 going about their work and they don't try to eliminate all of  
13 the Black and Hispanic people but they cherrypick the ones that  
14 may appear to be more favorable to their side. And there's  
11:40 15 nothing wrong with that.

16 There's something wrong with striking them all  
17 just because you assume that they're going to be more inclined  
18 to be sympathetic toward the defendant, which is not true.

19 Q. And, so, is this -- basically, is it pre Batson you were  
11:41 20 trying to increase the number of Blacks and Latinos called for  
21 service --

22 A. Yes.

23 Q. -- so as to respond to -- reduce the likelihood that the  
24 prosecutor would be able to eliminate all of the Blacks and  
11:41 25 Latinos through the use of peremptory challenges?

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11:41 1 A. Yes.

2 Q. Okay. And aside from your work in the legislature, pre  
3 Batson, did you, as an attorney, raise challenges --

4 A. Yes.

11:41 5 Q. -- against the prosecutors' -- the Harris County  
6 prosecutors' use of peremptory challenges?

7 A. Yes.

8 Q. Even though there was no law --

9 A. Right.

11:41 10 Q. -- that supported it?

11 A. The judges kept telling me, "Why are you doing this,"  
12 because of Swain. And I would look them in the face and say  
13 that Swain was wrong, the Supreme Court was wrong.

14 Well, I turned out to be right.

11:41 15 Q. And, so, you raised these challenges --

16 A. The ones I spoke about were pre Batson. But because the  
17 Supreme Court puts the imprimatur of something -- on something,  
18 if you know it's wrong, you have to say so.

19 The law never changes unless somebody speaks out.

11:42 20 If the lawyer who represented Batson hadn't made an objection,  
21 even in view of Swain versus Alabama, then it would still be  
22 the law. It would.

23 Q. Thank you.

24 MS. SWARNS: May I have a moment, your Honor?

11:42 25 THE COURT: Yes.

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11:42 1 *(Sotto voce discussion between plaintiff's counsel.)*

2 MS. SWARNS: I don't have any further questions for  
3 Mr. Washington.

4 THE COURT: Do you have any?

11:42 5 MS. MIRANDA: Yes, ma'am.

6 THE COURT: All right, Ms. Miranda.

7 **CROSS-EXAMINATION**

8 BY MS. MIRANDA:

9 Q. Mr. Washington, are you familiar with the prosecutors in  
11:43 10 this case?

11 A. Yes, ma'am.

12 Q. Okay. Can you tell us who they are?

13 A. Mr. Keno Hernandez, whom I spoke with this morning, and  
14 Ms. Norma Davenport, whom I met -- I knew already, but I  
11:43 15 noticed that she was a prosecutor when I assumed she was --

16 THE COURT: That's not a live mic. Don't worry about  
17 it.

18 A. I assumed that she was since she was here yesterday. I  
19 know them both.

11:43 20 BY MS. MIRANDA:

21 Q. Did you ever, in the course of trying cases in Harris  
22 County, try cases against either Ms. Davenport or  
23 Mr. Henderson?

24 A. Against both.

11:43 25 Q. Okay. How many cases; do you recall?

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11:43 1 A. I've slept since then. Long time ago.

2 Q. I understand.

3 Okay. Do you have just a general idea or -- and  
4 if you can't answer, that's okay.

11:43 5 A. I would say several. Probably less than ten, because we  
6 had eight or ten district courts even back then. And  
7 Ms. Davenport is probably a little younger -- and I'm glad  
8 she's not here -- probably a lot younger than Mr. Henderson and  
9 myself.

11:44 10 Q. Okay.

11 A. But she would have been considered a baby lawyer. I may  
12 have tried a misdemeanor or two against her, but I remember  
13 that Mr. Keno Henderson and I tried several jury trials in  
14 felony court. And we probably had many more cases than that  
11:44 15 that didn't result in a trial.

16 Q. Okay. And can you share with the Court what you shared  
17 with me outside, about your opinion of Mr. Henderson as a  
18 prosecutor?

19 A. He's a straight-up guy, first class.

11:44 20 Q. Did you participate -- let me back up. Not participate in  
21 the voir dire of any case. But you mentioned that occasionally  
22 you would go, even when it wasn't your case, to kind of sit in.

23 Was this case, which was Mr. Rosales, Mariano  
24 Rosales, did you at any point have an opportunity to sit in on  
11:45 25 the voir dire of this case and see any of the questioning in

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11:45 1 this case?

2 A. Tell me who defended him, and I can tell you whether I did.

3 Q. All I know is Mr. Boyd. I'm not sure if they're --

4 A. Wesley Boyd?

11:45 5 THE COURT: No.

6 MR. JONES: Mr. Walter Boyd.

7 A. Oh, Walter. I know Walter.

8 It doesn't ring a bell. I don't know

9 Mr. Rosales, and I don't remember -- I didn't know -- I don't

11:45 10 know the facts of the case. It's likely that I did not -- not

11 to -- let me see. Let me back up. I shouldn't say "likely."

12 I don't remember ever having watched Mr. Boyd in

13 a voir dire in a capital case.

14 BY MS. MIRANDA:

11:46 15 Q. Okay. Have you at any point spoken to either Mr. Henderson

16 or Ms. Davenport about their questioning in the voir dire of

17 this case?

18 A. No, ma'am.

19 Q. Have you spoken to either one of them about their general

11:46 20 practices of voir dire in any case?

21 A. No, ma'am. We never had a capital case together. It would

22 have been non-capital cases with either/or both of them, and I

23 don't -- I don't think that I ever had a case in which they

24 were both involved at the same time.

11:46 25 Q. Okay. Did you ever discuss -- even in the non-capital

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1 cases, did you ever discuss their voir dire strategies or  
2 general practices regarding non-capital cases?

3 A. No, ma'am.

4 Q. Okay. Now, you mentioned this systemic problem that was  
5 obvious to you in the Eighties, around the time of the case  
6 that this time was trialed [sic]. In your experience and in  
7 your opinion, did all of the assistant district attorneys at  
8 Harris County participate in the same discriminatory -- in your  
9 opinion, discriminatory practices?

10 A. I can't say all, but I can say all that I saw --

11 Q. Okay.

12 A. -- would try their best to eliminate minorities from the  
13 jury selection because many held the mistaken belief that a  
14 Hispanic would not convict a Hispanic and a Black wouldn't  
15 convict a Black. And I know those things not to be true.

16 Q. Okay. Okay. And I just want to ask you a question about  
17 the process in a capital case, as far as the voir dire.

18 A. Yes, ma'am.

19 Q. Are they brought in as a group and you voir dire them all  
20 together, so you see the entire panel at once, or are they  
21 brought in separately, in individual groups?

22 THE COURT: In what case?

23 MS. MIRANDA: Capital cases, in general.

24 THE COURT: In capital cases, in general, in Harris  
25 County during the Eighties or --

*Miranda Cross of Washington*

11:48 1 MS. MIRANDA: Yes. Yes, ma'am. I apologize. I'm  
2 trying to establish the practices of seeing the entire panel.  
3 He made a statement about --

4 THE COURT: Well, just ask the question. I just  
11:48 5 wanted to make sure that I knew where you were.

6 MS. MIRANDA: Okay.

7 BY MS. MIRANDA:

8 Q. Did you understand the question? You may have been  
9 confused, also.

11:48 10 A. No. I understood it after the colloquy between you and the  
11 Court.

12 Q. Okay.

13 A. What would happen is that the Court would send for a group.  
14 I hate to -- hesitate to call them a "panel" because that would  
11:48 15 connote all the -- from which the jury would be chosen, which  
16 is not like they did it in State. That's how they do it in  
17 federal court. But they would not, say, get 200 people from  
18 one call. During that time, jurors were almost all called on  
19 Mondays. Now the practice has changed.

11:49 20 But they would send for, say, a mini panel for  
21 one of them. I don't know if there was a name for it but --

22 Q. Sure.

23 A. -- at the beginning, the first day of jury selection, the  
24 Court would, I guess depending on the lawyers and what they  
11:49 25 expected the lawyers to be able to cover in a day, may be



*Miranda Cross of Washington*

11:49 1 overly optimistic and call, say, 30 people.

2 Or if the Court had not tried a capital case  
3 before and wasn't familiar with the arduous detail required in  
4 order to really get down to the real -- where the rubber meets  
11:49 5 the road on these cases, they may call 40. Most often, after  
6 they kind of establish a pattern, they'd call about 20 a day.

7 The panel would come in. The judge would qualify  
8 the panel -- in other words, ask the general questions; pass  
9 out a questionnaire -- or maybe call enough for the week, maybe  
11:50 10 40; pass out a questionnaire; and then, so as to not have  
11 inconvenienced them any more than necessary --

12 Q. Right.

13 A. -- the citizens and voters in the county, which elected  
14 judges, he'd send enough home -- all home but those that they  
11:50 15 thought they would be able to handle in one day's time, which  
16 was typically three or four in the morning session and then  
17 three or four in the afternoon session.

18 They would have the 40 there, ask them the  
19 general questions, save some questions that the Court would go  
11:50 20 into -- they would cover the general stuff, like burden of  
21 proof, presumption of innocence, that it was a capital case,  
22 things of that nature; pass out a questionnaire; swear them to  
23 answer truthfully on the questionnaire; and then keep enough  
24 for that morning session and then parcel out the rest of them  
11:50 25 for the next several days or perhaps even the week.

*Miranda Cross of Washington*

11:50 1 Then they -- and the voir dire was a sequestered  
2 voir dire; that is, only one venire person would be in the  
3 courtroom, on the witness stand, to be examined at a time.  
4 And, then, when examination was finished with that person, the  
11:51 5 Court would send for the bailiff to call the next person in.  
6 Q. Okay. And if they didn't get enough jurors from that  
7 initial -- like you said, I'm not sure what the name of it is.  
8 A. Yes, ma'am.  
9 Q. Would they have to then, like, the next week call in an  
11:51 10 additional panel or is it --  
11 A. Oh, they --  
12 Q. -- to continue with juror selection --  
13 A. Oh, yes.  
14 Q. -- in a capital case?  
11:51 15 A. They almost never get enough from 40 people.  
16 Q. Okay.  
17 A. To -- I mean, most of the time it takes close to hundred or  
18 more --  
19 Q. Sure.  
11:51 20 A. -- to -- before you could pick.  
21 So, they -- rather than have all those people  
22 inconvenienced -- and I imagine it's a management problem of  
23 spacing them out --  
24 Q. Oh, absolutely.  
11:51 25 A. -- two three weeks.

*Miranda Cross of Washington*

11:51 1 Q. Sure.

2 A. They'd maybe take one week's worth, a bite so to speak.

3 Q. Right.

4 A. And then, if they finish those -- when they finish that

11:51 5 panel, if it were toward the end of the week, they'd just quit

6 for the week and then call in 40 more the next Monday, and

7 continue that process until -- and, then, by that time, the

8 Court can get some rhythm as to how long it's taking the

9 lawyers, how many are going to fall out on the -- what was the

11:52 10 Wistherspoon questions then, that -- you know.

11 Q. Sure.

12 A. A lot of people disqualified themselves one way or the

13 other at the very beginning. And, so, you might have some

14 spaces. But the Court was trying to keep everything moving by

11:52 15 keeping enough people in the flow, in the pipeline, so to

16 speak, so that you could move through and not inconvenience the

17 citizens any more than necessary.

18 But, then, they knew that they would have to call

19 some more. Until you get close -- I mean, you got ten jurors

11:52 20 and you're going --

21 Q. Right.

22 A. -- to seat 12 and two alternates, maybe you cut back on the

23 number of people you call for the next week, with the

24 expectation that based on -- again, you can look ahead on the

11:52 25 questionnaires and see some of the things that you need to

*Miranda Cross of Washington*

11:52 1 know.

2 Q. Right.

3 A. Because once you brought the 40 in, they would all turn in  
4 their questionnaires and the lawyers would have access to that

11:52 5 even before the people came. So, you would have some idea,

6 before you even saw so-and-so in the face, what she or he

7 looked like on paper in terms of how they answered the

8 questions, which had to do with their death qualification and

9 also other aspects of their lives, like what magazines they

11:53 10 read and bumper stickers and things that lawyers are curious

11 about that may -- we may think mean something --

12 Q. Correct.

13 A. -- and may or may not mean anything.

14 Q. Okay. All right.

11:53 15 *(Sotto voce discussion between defense counsel.)*

16 MS. MIRANDA: We'll pass the witness, your Honor.

17 THE COURT: Anything else?

18 MS. SWARNS: Just a few questions.

19 **REDIRECT EXAMINATION**

11:53 20 BY MS. SWARNS:

21 Q. Mr. Washington, Ms. Miranda asked you and you shared with  
22 the Court your opinion of Mr. Henderson --

23 A. Yes.

24 Q. -- and your experience about him as a prosecutor.

11:53 25 Do you have the same opinion of Ms. Davenport

*Swarns Redirect of Washington*

11:53 1 that you have of Mr. Henderson?

2 A. In fairness, I don't think that I had occasion to work with  
3 her. And it's not a chauvinistic thing or anything like that.  
4 It's not a "good old boy" thing. But I don't -- I don't recall  
11:54 5 as vividly any experiences, either negative or positive, with  
6 Ms. Davenport.

7 I remember her being in the district attorney's  
8 office. I'm sure that we shared some cases. But  
9 Mr. Henderson -- I think, over the course of many years, you  
11:54 10 tend to remember really bad experiences you have with people or  
11 really good experiences. And my experiences with  
12 Mr. Henderson, he's a straight-up guy, like I said. He's a  
13 gentleman. And, unfortunately, there are not enough of us in  
14 the legal profession. He stands out.

11:54 15 Not to say that she -- I just don't have that  
16 recollection of my experiences with her. Not to say that  
17 they're bad. They just don't rise to the level of my either  
18 recollection or experience with Ms. Davenport in the same way  
19 that I fondly recall Mr. Henderson.

11:54 20 Q. Okay. You -- you were discussing how groups of prospective  
21 jurors were brought in --

22 A. Yes.

23 Q. -- and then individually questioned.

24 Were the lawyers, the prosecutors and the defense  
11:55 25 lawyers, present when those groups were instructed by the

*Swarns Redirect of Washington*

11:55

1 judge?

2 A. Yes. They have to be present. The defendant and both  
3 counsel have to be present when they're instructed by the  
4 Court.

11:55

5 Q. And, so, you could look out at the group and you could see  
6 how many Black or Latino prospective jurors were in each  
7 particular group that was called?

8 A. Yes. As a matter of fact, that would be the time to make a  
9 motion to shuffle, which was allowed under state law.

11:55

10 If you were -- if you were trying to -- if you  
11 had some minority persons in the back and you were trying to  
12 shuffle -- if they appeared to be stacked toward the back, for  
13 instance, it would be a good thing to maybe want to shuffle --  
14 reshuffle the 40 people, which is not inconvenient for the  
15 clerk to just reshuffle their names and change the order in  
16 which they're presented, because that's just arbitrary anyway.

11:55

17 But you'd get an opportunity to look at the  
18 entire 40 group of people; and you would make notations in your  
19 mind as to whether there was underrepresentation,  
20 overrepresentation, or no representation in that group of  
21 people that were presented.

11:56

22 Q. Okay. And just as a final question, you talked a lot about  
23 your experiences with the district attorney's office striking  
24 African-American jurors.

11:56

25 Is your experience the same with that office

*Swarns Redirect of Washington*

11:56 1 striking Latino jurors?

2 A. Yes.

3 MS. SWARNS: Okay. We have nothing further.

4 THE COURT: All right. Anything?

11:56 5 MS. MIRANDA: Nothing.

6 THE COURT: All right. Thank you, Mr. Washington.

7 MR. WASHINGTON: May I be excused?

8 THE COURT: Yes.

9 No other witnesses from the petitioner?

11:56 10 MS. SWARNS: No, your Honor.

11 THE COURT: Anything else from the respondent?

12 MS. MIRANDA: No, your Honor.

13 THE COURT: Do you guys want to have an opportunity to  
14 make any final arguments to the Court?

11:56 15 MS. SWARNS: We certainly can or we could --

16 THE COURT: Don't have to. I'm just asking.

17 I don't -- people accuse me of -- in bench  
18 situations, of short-circuiting the lawyers' opportunity to  
19 speak. I have, literally, been standing up and walking out the  
11:57 20 room with lawyers screaming after me, "Wait, wait. I didn't  
21 get a chance to say anything."

22 And, so, I've decided to stop doing that and just  
23 to at least ask if you would -- I mean, obviously, there's been  
24 a lot of briefing in this case and, obviously, we've read it  
11:57 25 all.

11:57 1 My view probably is that there's not much more  
2 that can be added. I just don't want to get up and walk out of  
3 the room without giving you the opportunity to provide me any  
4 summation that you might feel is warranted or necessary or that  
11:57 5 you think could potentially be helpful. Don't feel obliged to  
6 say anything.

7 MS. SWARNS: Well, in the process of thinking about  
8 the answer to that question, is your Honor anticipating that we  
9 will be doing post hearing briefing or --

11:57 10 THE COURT: We talked about that a little bit  
11 yesterday, my law clerks and I. And, frankly, I wasn't  
12 thinking that we would need any.

13 Was there anything else that you thought that I  
14 didn't have before me?

11:58 15 Obviously, I'm keeping all these exhibits, and  
16 I'm keeping them the way that you provided them to me because  
17 it's helpful for me, now that I've taken my notes and listened  
18 to the testimony, to utilize the exhibits the way that they've  
19 been numbered for trial as opposed to the way that I had them  
11:58 20 in my binder when I came in here yesterday, which was just  
21 attached as exhibits to some of the earlier briefing.

22 So, I'm going to be utilizing the exhibit numbers  
23 in the way that we've used them throughout this proceeding.  
24 But I wasn't thinking that I was going to want or need any post  
11:58 25 hearing briefing unless there's some issue you think we've



1 missed or that you think you can flesh out more clearly as a  
2 result of what we've heard over the last couple of days.

3 What was your thought?

4 MS. SWARNS: I was anticipating that we would be able  
5 to write, at least briefly, once we received the transcripts of  
6 the testimony that we've received today --

7 THE COURT: Here's what I don't want. Let me just be  
8 honest with you. Here's what I don't want. I don't want  
9 post-hearing briefing that's, like, basically a summation of  
10 all the briefing that I've gotten before. That is not helpful  
11 to me. That just, like, means that I just have to go back and  
12 look at the exact same thing again that we've already looked  
13 at.

14 I was here. I was paying attention. You could  
15 tell. I was looking and taking notes the whole time. I don't  
16 need you to go back and tell me the exact same thing that we  
17 heard before.

18 If there's some new issue, however, or something  
19 that you think potentially would not be emphasized in the way  
20 that you want it to be emphasized, I'm perfectly willing to  
21 look at additional post-hearing briefing. But I just don't  
22 need you just to do me some briefs just to summarize what we  
23 heard here the last couple days. I just don't need it.

24 MS. SWARNS: Okay. Why don't we -- if your Honor  
25 would allow us, then -- I don't know what Ms. Miranda's

11:59 1 position would be, but perhaps we could break for lunch and  
2 then do a brief closing just so we can give you our thoughts --

3 THE COURT: Sure. I mean, I --

4 MS. SWARNS: -- based on the testimony. And, then,  
12:00 5 once we get the transcript, if there's something that seems to  
6 us that's, you know, glaring, that we really, really need you  
7 to know that we haven't already said, we'll do a very tiny  
8 supplement.

9 THE COURT: Okay. I don't know what you mean by "once  
12:00 10 you get the transcript," because -- I'm going to be honest with  
11 you. Here's how my little feeble mind works. I start looking  
12 at the issues as soon as I walk out of this room this  
13 afternoon; and I start going through the testimony and the  
14 briefing and the exhibits to sort of get my thoughts together  
12:00 15 and start doing my preliminary outline on my opinion, based on  
16 what I've heard.

17 I don't want too many days to pass by, where I've  
18 had an opportunity like this, a good opportunity to actually do  
19 what I'm charged with doing in this particular instance, which  
12:00 20 is to evaluate the credibility of the witnesses with respect to  
21 the evidence that's been marshaled and placed before the Court  
22 on this issue.

23 So, you know, I'm going to start looking at it  
24 right away and probably have substantially outlined my thoughts  
12:00 25 on it before -- between now and the end of the week.

12:01 1 So, you know, my thought is we all know what  
2 we've heard over the last couple of days. Let's make a  
3 decision today, after lunch sometime, about whether or not  
4 we're going to do any post-hearing briefing, so that I can set  
12:01 5 a schedule for that and know what it is that I'm anticipating  
6 that I'm going to be getting.

7 So, it's 12:00 o'clock. Let's take a long lunch  
8 since we don't have any more witnesses. Let's just be back at  
9 1:30. It's not a real long lunch, but let's be back at 1:30.  
12:01 10 That way, you can actually eat and marshal your thoughts.

11 MS. SWARNS: Thank you.

12 THE COURT: And then we'll come back at 1:30. And,  
13 you know, if you decide you have something you want to tell me,  
14 great. If you decide that -- you know, that you've made enough  
12:01 15 of a record, that's fine, too. Doesn't make any difference to  
16 me.

17 But let's talk this afternoon about whether or  
18 not we want to or need to do any post-hearing briefing, and  
19 then we'll set a schedule for doing that this afternoon.

12:02 20 MS. SWARNS: Okay. Thank you, your Honor.

21 A PRISON GUARD: Judge? Your Honor?

22 MR. ROSALES: Your Honor?

23 THE COURT: Oh, I'm sorry. Yes?

24 A PRISON GUARD: Do we need to be back at 1:30 or not?

12:02 25 THE COURT: Yes, please. Please. And -- yes, please,

1 I would like him to be back at 1:30 because if we have  
2 additional arguments that the lawyers are going to be making to  
3 the Court this afternoon he would need to be present for those  
4 arguments, as well.

5 A PRISON GUARD: Okay.

6 THE COURT: Okay? Thank you very much.

7 MR. ROSALES: Yes. Thank you.

8 THE COURT: Ma'am?

9 A PRISON GUARD: Okay. He said, "Thank you."

10 THE COURT: Okay. I was just saying "thank you" to  
11 you.

12 Okay. Thanks.

13 *(Recess taken from 12:02 to 1:38 p.m.)*

14 THE COURT: All right. Good afternoon, everybody.  
15 Please be seated.

16 So, what are we going to do this afternoon? Are  
17 we going to do any summation at all?

18 MS. SWARNS: Yes, your Honor.

19 THE COURT: Okay. Let me hear from petitioner,  
20 please.

21 MS. SWARNS: Thank you, your Honor.

22 As you know, we are here alleging that  
23 Mr. Rosales' -- Mr. Rosales' jury was selected in a racially  
24 discriminatory manner, that the prosecutors exercised their  
25 peremptory challenges to exclude Black and Latino jurors on

01:39 1 account of race and that in doing so they violated Mr. Rosales'  
2 right to a fair and impartially selected jury.

3 We believe that the evidence that has been  
4 presented through the testimony of Ms. Davenport and  
01:39 5 Mr. Washington establishes that there were no race neutral  
6 reasons for the exercise of peremptory challenges in this case.  
7 And I would begin by saying --

8 THE COURT: On any of the jurors that were struck?

9 MS. SWARNS: I'm going to run through as many -- as  
01:39 10 much of the evidence as I can. I don't have much time. But we  
11 think that there's certainly -- there's no question that there  
12 were peremptory challenges exercised by Ms. Davenport on the  
13 basis of race. Let me put it that way.

14 I think we need to -- first, Miller-El dictates  
01:40 15 that we have to view Ms. Davenport's testimony today through  
16 the lens of history; and we know that there's a documented  
17 history of racial discrimination in Harris County. That has  
18 been documented by Courts, including the United States Supreme  
19 Court and the Texas Court of Criminal Appeals.

01:40 20 In 1984 United States Supreme Court Justice  
21 Thurgood Marshall noted that in the 19 years since Swain had  
22 then been handed down prosecutorial abuses of peremptory  
23 challenges had grown to epidemic proportions in certain regions  
24 of the country, and he noted the well-marshaled evidence  
01:40 25 presented in Harris that demonstrated that Harris County

01:40 1 routinely excluded Blacks from juries.

2 And during the course of making those findings,  
3 Justice Marshall cited to the testimony of Craig Washington,  
4 who offered, of course, consistent testimony today.

01:40 5 In 1987 the Texas Court of Criminal Appeals, in a  
6 decision entitled "Tompkins versus State," a case that involved  
7 specifically Ms. Davenport, found that the defense had  
8 established that -- and I quote them -- "Black jurors have been  
9 relatively uncommon on capital murder juries in Harris County  
01:41 10 during the past several years."

11 The testimony on which that decision and that  
12 finding was based was summarized in our findings of fact. It  
13 includes the testimony of Harris County prosecutors, including  
14 the district attorney who was at the head of the office during  
01:41 15 the time of Mr. Rosales' trial, John Holmes, who testified  
16 that -- together these prosecutors testified variously that it  
17 was a general rule in that office to be wary of minorities,  
18 that there were conversations among prosecutors about the  
19 undesirability of minorities on juries, that the prosecutors  
01:41 20 commonly believed that Blacks are more inclined to be  
21 sympathetic toward other Blacks, and that Blacks or minorities  
22 were more inclined to be lenient toward defendants.

23 THE COURT: Are you saying, then, by your argument  
24 that it was wrong for them to have those beliefs, that there  
01:42 25 was no basis in fact to any of those beliefs --

01:42 1       *(The video screen goes blank momentarily.)*  
2       THE COURT: Oh, crud -- oh, there we go.  
3       And that -- so, for them to have that belief or  
4 to express --  
01:42 5       A PRISON GUARD: Your Honor?  
6       THE COURT: I'm sorry?  
7       MR. ROSALES: We --  
8       A PRISON GUARD: We can't hear you.  
9       THE COURT: Oh, my goodness.  
01:42 10       *(Indicating).* Okay. What about now?  
11       MR. ROSALES: We can't hear you.  
12       THE COURT: *(Indicating).* Okay. Hold on one second,  
13 then. One minute.  
14       *(Discussion off the record)*  
01:43 15       THE COURT: Mr. Rosales, can you hear me again?  
16       MR. ROSALES: Can't hear you.  
17       *(Sotto voce discussion at bench with court staff)*  
18       THE COURT: *(Indicating).* Time out. One minute.  
19       He got that one.  
01:46 20       *(Discussion off the record and video has restarted.)*  
21       MR. ROSALES: We can hear you now.  
22       THE COURT: Oh, you can hear me?  
23       MR. ROSALES: We can hear you now.  
24       *(Sotto voce discussion at bench with court staff)*  
02:01 25       THE COURT: All right. Mr. Rosales, can you hear me

02:01 1 now?

2 MR. ROSALES: Yes, ma'am.

3 THE COURT: All right. And we can hear you fine. So,  
4 we're going to go ahead and -- thank you. Sorry for the  
02:02 5 trouble.

6 Apparently the problem wasn't on our end or your  
7 end. It was somewhere in between.

8 MR. ROSALES: All right.

9 THE COURT: Okay. Here we go.

02:02 10 Ms. Swarns, you were in the middle of making your  
11 argument; and I was getting ready to ask you a question. And  
12 my question was this. You made the argument, I think, that  
13 the -- that there existed a culture of discrimination in the  
14 district attorney's office. And one of the examples that you  
02:02 15 gave was that Harris County prosecutors had expressed the view  
16 that minorities were more sympathetic to defendants than  
17 non-minorities.

18 And, so, my question was, if, in fact, that was  
19 the basis of their experience, if, in fact, they had suffered  
02:03 20 some jury nullification as a result of minority jurors being on  
21 a panel, is it your position that it was inherently  
22 discriminatory for them to hold that view, that minorities were  
23 more sympathetic to defendants than non-minorities if, in fact,  
24 that was a belief or a statement that was made on the basis of  
02:03 25 their own experiences?



02:03 1 MS. SWARNS: No, your Honor. I think that in Batson,  
2 itself, it says that what is unconstitutional is if a  
3 prosecutor holds the view that a person, a Black person, as  
4 referred to in Batson --

02:03 5 THE COURT: Right.

6 MS. SWARNS: -- would be more sympathetic to another  
7 Black person, a Black defendant particularly, simply on a  
8 basis -- on the basis of their shared racial identity and then  
9 that prosecutor takes the additional step of striking Black  
02:03 10 jurors based on the assumption that they will be sympathetic  
11 without, you know, having specific indications from individual  
12 questioning of an individual African-American juror that  
13 demonstrates that there is actual sympathy.

14 THE COURT: Okay. So, it's not necessarily prohibited  
02:04 15 for them to express or have that belief if they don't act on  
16 it.

17 MS. SWARNS: Right. It's prohibited to act on  
18 race-based stereotypes --

19 THE COURT: Okay.

02:04 20 MS. SWARNS: -- in an assumption and excluding jurors  
21 of color. And that's specifically addressed by the Court in  
22 Batson, itself.

23 THE COURT: Okay.

24 MS. SWARNS: And what the Courts that I was speaking  
02:04 25 of have actually noted was not that just were these views

02:04 1 commonly held within the Harris County prosecutors, the  
2 district attorney's office, but that there was evidence that  
3 there was acting on that belief, basically, that they practiced  
4 what they preached.

02:04 5 THE COURT: Okay.

6 MS. SWARNS: And I would just go on to say that it's  
7 not only a broad based evidence of a culture of discrimination,  
8 in the language of Miller-El, but there's evidence specific to  
9 the trial prosecutor at issue in this case. One of the cases  
02:04 10 that ultimately went to the United States Supreme Court --  
11 that's *Tompkins* --

12 THE COURT: Versus State?

13 MS. SWARNS: That's correct.

14 THE COURT: Okay.

02:05 15 MS. SWARNS: -- was -- Ms. Davenport was the trial  
16 prosecutor. When that case was litigated -- and that was a  
17 Batson challenge -- the Court of Criminal Appeals actually  
18 rejected and found unsupported by the record all of the reasons  
19 offered by Ms. Davenport, with the exception of one. They  
02:05 20 specifically noted that her justifications were not supported  
21 when compared to the record. They upheld the Batson challenge  
22 with respect to one challenge -- with one explanation --

23 THE COURT: What was the year of *Tompkins* versus  
24 State -- *Thompson* versus State?

02:05 25 MS. SWARNS: "*Tompkins*."

02:05 1 THE COURT: "Tompkins," I mean. I'm sorry.

2 What was the year that she tried that case?

3 MS. SWARNS: We think the trial was '81.

4 THE COURT: Okay.

02:05 5 MS. SWARNS: And the hearing -- right -- the Batson  
6 hearing was '86 or '87. So, this is all contemporaneous with  
7 Mr. Rosales' trial.

8 THE COURT: Okay.

9 MS. SWARNS: The Court of Criminal Appeals ultimately  
02:05 10 does uphold the one remaining justification of a strike offered  
11 by Ms. Davenport in the Tompkins case, but I -- they  
12 specifically reluctantly uphold it. They say they don't  
13 understand it. They acknowledge that it's race neutral, but  
14 they don't understand it.

02:06 15 And, actually, they admonish the trial Courts to  
16 be very critical and careful in their evaluation of the  
17 credibility of trial prosecutors because they were struggling,  
18 obviously, to understand why the reason offered by  
19 Ms. Davenport was actually relevant to the case or -- or  
02:06 20 reasonable.

21 And I would also note that when -- after the  
22 Court of Criminal Appeals reached that decision, the attorney  
23 general's office abandoned the reason that was offered by  
24 Ms. Davenport and proceeded in defending this conviction on  
02:06 25 other grounds.

02:06 1 So, there is evidence not just that the Harris  
2 County District Attorney's Office, in a macro sense, you know,  
3 has a culture of discrimination but there's previous evidence  
4 that Ms. Davenport, herself, has offered reasons -- purported  
02:06 5 to offer race neutral reasons for a strike that were found  
6 unjustified by a Court.

7 So, there's both prosecutor specific findings as  
8 well as prosecutor's office specific findings which demonstrate  
9 the history and a culture of discrimination with which our  
02:07 10 claim needs to be viewed -- through which our claim needs to be  
11 viewed.

12 With respect to Mr. Rosales' case, the evidence  
13 shows this. Ms. Davenport was lead counsel. That was her  
14 testimony yesterday. She's testified she was first chair. She  
02:07 15 testified she had primary responsibility for this prosecution.  
16 She testified she did most of the work to prepare for this  
17 trial. She testified that Mr. Henderson sat second chair to  
18 her in this matter.

19 That testimony is corroborated by comments made  
02:07 20 by Mr. Henderson during his deposition; and his deposition, as  
21 you know, is an exhibit admitted in this matter.

22 THE COURT: Right.

23 MS. SWARNS: And when he speaks with respect to the  
24 strike, Ms. Davenport's strike of Juror Holmes, he says -- and  
02:07 25 I quote -- "You know, I don't know what was going through

02:07 1 Norma's mind."

2 So, that notion, that she is the lead counsel in  
3 this case, is corroborated by Mr. Henderson's testimony. It's  
4 also corroborated by the fact that Ms. Davenport's notes  
02:08 5 indicate that she advised Mr. Henderson even with respect to  
6 the strikes and the questioning of jurors.

7 THE COURT: Where is that quotation from Mr. --

8 MS. SWARNS: That's Page 57 of Mr. Henderson's  
9 deposition.

02:08 10 THE COURT: Of Mr. Henderson's deposition. Just a  
11 second. Depositions.

12 MS. SWARNS: It says he offers some reasons -- he  
13 begins, when addressing Ms. Holmes and why she was struck on,  
14 Page 55.

02:08 15 And he says -- I asked, "Question, Do you recall  
16 why it was that you and Ms. Davenport exercised the peremptory  
17 challenge against Ms. Holmes?"

18 "Answer: No."

19 THE COURT: I'm sorry. I thought you said Page 57.

02:08 20 MS. SWARNS: Yes. I'm just trying to give you the  
21 full context. Yes, at 55.

22 THE COURT: Where do you start on Page 55?

23 MS. SWARNS: Line 11. My question, "Do you recall why  
24 it was that you and Ms. Davenport exercised the peremptory  
02:08 25 challenge against Ms. Holmes?"

02:08 1 "Answer: No, I don't. Unless she had -- I don't  
2 know what -- why we did that. Just give me a second."

3 And then I say, "Sure. Take your time."

4 And in between Page 55 and 56 he suggests two  
02:09 5 possible reasons for the strike.

6 And, then, on Page 57, I say -- I said it's --  
7 how many -- I was continuing, actually. It says he asked me  
8 what strike was [sic]. I say she's the 13th strike.

9 THE COURT: Where are you on Page 57? I'm lost.

02:09 10 MS. SWARNS: On Page 57, Line 9, is ultimately where  
11 he says, "You know, I don't know what was going through Norma's  
12 mind. But those are a couple of concerns I have, but I don't  
13 know what we were -- what we were thinking at the time as to  
14 why that strike was executed."

02:09 15 Okay. Consistent with that, we have notes  
16 handwritten by Ms. Davenport indicating that she was advising  
17 Mr. Henderson with respect to the jurors that he was  
18 questioning.

19 With respect, for example, to prospective  
02:09 20 African-American juror who was stricken, Alicia Taylor, that --  
21 the record reflects Mr. Henderson was questioning Ms. Taylor;  
22 but Ms. Davenport wrote down Black -- she made the specific  
23 race notation "BF," Black female. She writes, "Articulate, but  
24 not totally. She gets worse when she gets along -- goes  
02:10 25 along." So, there's [sic] clear that Ms. Davenport is acting

02:10 1 and functioning as lead counsel with respect to the peremptory  
2 challenges exercised in this case.

3 Ms. Davenport begins by offering an affidavit  
4 purporting to contain her, supposedly, race neutral reasons for  
02:10 5 her challenges. During the course of her testimony yesterday,  
6 she disclaimed many, if not most, of the reasons that were  
7 contained in that affidavit. She added reasons that she had  
8 never before mentioned in the affidavit. And, so --

9 THE COURT: Why do you -- why do you say she  
02:10 10 disclaimed the reasons in --

11 MS. SWARNS: Because she --

12 THE COURT: -- the affidavit?

13 MS. SWARNS: -- she repeatedly --

14 THE COURT: Wait. Stop. We can't talk at the same  
02:10 15 time.

16 MS. SWARNS: I'm sorry.

17 THE COURT: Let me ask my question again. Why do you  
18 say that she disclaimed the reasons that she listed in her  
19 affidavit?

02:10 20 MS. SWARNS: During Mr. Gray's questioning, he asked  
21 her on numerous occasions, "Your affidavit says this is what  
22 the reason for the strike was."

23 And her response was, "I have no idea why we  
24 struck this juror. I can't remember. It was 23 years ago."  
02:11 25 On more than one occasion the record will reflect that, when

0 2 : 1 1 1 specifically draw -- her attention was specifically drawn to a  
2 reason that was listed in her affidavit, she testified that she  
3 didn't know whether that was the reason and/or no longer  
4 believed that was the reason and could not recall that that was  
0 2 : 1 1 5 the reason.

6 THE COURT: I'm kind of not remembering it that way.  
7 Are you sure that that's what you think?

8 MS. SWARNS: I'm very sure.

9 THE COURT: Okay. I'm not remembering it like that.  
0 2 : 1 1 10 I remember that in most instances in which he asked her about  
11 her testimony -- or her stated reasons in the affidavit that  
12 her response was, "Well, that was one of them" --

13 MS. SWARNS: Yes.

14 THE COURT: -- "but there were some other reasons."  
0 2 : 1 1 15 And I've had time to think about other things as time has gone  
16 on" --

17 MS. SWARNS: She said --

18 THE COURT: -- not that she completely disclaimed that  
19 that was some reason that she relied on that was listed in her  
0 2 : 1 2 20 affidavit, but that she indicated that it was not the only  
21 reason in most of those instances.

22 MS. SWARNS: She said exactly what your Honor has  
23 indicated, as well. But on other occasions, toward the end of  
24 the day, in the afternoon, Ms. Davenport specifically said when  
0 2 : 1 2 25 asked by Mr. Gray, "Is this the reason that you exercised -- or



02:12 1 one of the reasons that you exercised a strike against" --  
2 whichever juror he was speaking of -- she specifically said, "I  
3 have no idea. I don't remember. It was 23 years ago." And,  
4 so, on numerous occasions she disclaimed the reasons that were  
02:12 5 actually listed in her affidavit.

6 She also, as your Honor has briefly, I think,  
7 touched upon, relied on occasions, when she said she couldn't  
8 remember why she'd exercised a strike, on the assertion that  
9 there were reasons that were not apparent from the record,  
02:12 10 there were reasons that she couldn't remember that would  
11 support her exercise of peremptory challenges.

12 She also testified, of course, that she had no  
13 independent recollection of any of those reasons with respect  
14 to any of the challenged jurors. She had no current or  
02:13 15 independent recollection or refreshed recollection. She had no  
16 recollection whatsoever of the relevant jurors', the challenged  
17 jurors' demeanor, their appearance, non-verbal cues, whether  
18 they made eye contact, what the atmosphere in the courtroom was  
19 with respect to the challenged jurors. She had absolutely no  
02:13 20 current or refreshed recollection as to any of those factors.

21 Notwithstanding the fact, when she could not come  
22 up with a justification for why she struck a person of color  
23 for a reason that she accepted a White juror, she frequently  
24 retreated to the position that, "It must have been something  
02:13 25 that I saw," although she had no independent or refreshed

02:13 1 recollection of what those could be. And there's nothing in  
2 the record to suggest or to shed light on what those issues  
3 could be. There's nothing in the record to demonstrate that  
4 Juror Holmes demonstrated poor demeanor, you know, poor  
02:13 5 appearance, poor non-verbal cues, etcetera.

6 And I -- of course, I should have begun at the  
7 beginning, which is, of course, that Ms. Davenport acknowledges  
8 that she, consistent with the prosecutors in her office that  
9 testified in Tompkins and the other matters, shares the view  
02:14 10 that prospective jurors of color may sympathize with a  
11 defendant -- are more likely to sympathize with a defendant of  
12 color.

13 Interestingly, although she testified during her  
14 deposition that that was something that all groups would have  
02:14 15 since people from one group would sympathize with a person of  
16 another group, when she was asked whether, for example, a man  
17 would sympathize -- was she concerned about male jurors being  
18 sympathetic to Mr. Rosales, who was a man, or a male defendant,  
19 she specifically said, no, that was not a concern she would  
02:14 20 share.

21 So, when she talked about group identity, her  
22 only concerns with respect to group identity came up in the  
23 context of race. And, so, she shared and we believe acted upon  
24 and we believe the record reflects acted upon a stereotypical  
02:14 25 view, that was not supported by anything the stricken juror

02:15 1 said, that jurors of color would identify with Mr. Rosales; and  
2 she struck them on account of that belief.

3 We know that she was very concerned by race not  
4 just because she had this view that people of color would  
02:15 5 identify with a defendant of color, but we know that because  
6 she specifically tracked the race of the potential jurors.  
7 Ms. Davenport repeatedly wrote the race and gender of jurors of  
8 color in hand -- by hand on the juror questionnaires and cards.

9 Notably, the only jurors' racial identity she  
02:15 10 felt compelled to note was that of the jurors of color.

11 Ms. Davenport never felt compelled to note when there was a  
12 White juror. She repeatedly, however, felt compelled to note  
13 when a prospective juror was Black or a prospective juror was  
14 Latino.

02:15 15 Ms. Davenport initially proffered as a  
16 justification for these notes that, "Oh, I was doing it because  
17 Mr. Boyd had raised a Batson challenge." That, however, is  
18 completely refuted by the fact that the first juror she  
19 questioned, the first juror that was ever questioned by anybody  
02:16 20 in this case, happened to be a Mexican-American woman and on  
21 that juror's questionnaire and card, before any Batson  
22 challenge or any discrimination challenge has been raised,  
23 Ms. Davenport notes the race of that prospective juror.

24 So, Ms. Davenport -- and this is, I should add,  
02:16 25 in the context of an individual voir dire, where the juror was

0 2 : 1 6 1 sitting right in front of her, where there was no reason --  
2 it's not group voir dire where she was trying to remember who  
3 was who in a box of 12. This is one on one. So, she didn't --  
4 there was no reason to write down the race of a person to whom  
0 2 : 1 6 5 she was looking at. She wrote it down because she was  
6 concerned about race, because she was going to strike jurors on  
7 a basis of race.

8 THE COURT: She was then making the strike for each  
9 juror individually at the end of that --

0 2 : 1 6 10 MS. SWARNS: Yes.

11 THE COURT: -- juror's examination.

12 MS. SWARNS: Exactly. So, there was no reason for her  
13 to write the -- exactly. The juror --

14 THE COURT: As opposed to when you have the entire  
0 2 : 1 7 15 group and you're trying to --

16 MS. SWARNS: Exactly.

17 THE COURT: -- identify who --

18 MS. SWARNS: Was who.

19 THE COURT: -- was sitting where.

0 2 : 1 7 20 MS. SWARNS: Exactly. The strike occurred in meeting  
21 with the juror sitting right in front of you. There was no  
22 reason to write racial cues.

23 In addition to tracking specifically some gender  
24 notes, Ms. Davenport, when she didn't have a juror -- or for  
0 2 : 1 7 25 reasons I can't explain, she noted racial cues. Specifically,

02:17 1 when a juror wrote down the periodicals she read, she wrote  
2 down she read "Ebony," she read "Jet," and she read "Newsweek."  
3 Ms. Davenport underlined two of the three of those periodicals.  
4 Curiously, those would only be "Ebony" and "Jet." She was not  
02:17 5 interested at all in the fact that this prospective juror read  
6 "Newsweek," but was very interested in the fact that this juror  
7 read "Ebony" and "Jet," again corroborating the notion  
8 testified by Ms. Davenport that she was concerned about racial  
9 identity between prospective jurors and a defendant of color.

02:18 10 We also know that she noted repeatedly when  
11 prospective jurors lived in a predominantly Hispanic  
12 neighborhood. She said, "Well, I did that because I was  
13 concerned about whether jurors -- prospective jurors were  
14 living near the crime scene." Well, that explanation is  
02:18 15 entirely belied by the fact that she accepted two White  
16 prospective jurors who lived in exactly the same neighborhood  
17 that this crime occurred -- that was Jurors Willett and  
18 Williamson -- and, of course, by the fact that this crime did  
19 not occur in -- north of Houston. It occurred in Pasadena.

02:18 20 THE COURT: Well, didn't she also note the residences  
21 of several other jurors?

22 MS. SWARNS: She noted, actually interestingly, the  
23 residences of jurors in a very overwhelmingly White  
24 neighborhood, yes, she did.

02:18 25 THE COURT: And, so, are you saying that the two

02:19 1 people that -- whose neighborhood that she designated as living  
2 north of Houston -- which I'm not sure that north of Houston is  
3 an overwhelmingly Hispanic neighborhood even today -- but that  
4 those were persons that were struck by the prosecution?

02:19 5 MS. SWARNS: Yes. I'm saying that she repeated --  
6 well, she repeatedly -- I think it's evidence of tracking of  
7 race. She repeatedly noted when she believed that jurors lived  
8 in a -- in a what we believe to be, at that time at least, an  
9 Hispanic neighborhood. And, so, that was continued evidence --

02:19 10 THE COURT: What are you calling an Hispanic  
11 neighborhood?

12 MS. SWARNS: North of downtown.

13 THE COURT: Okay.

14 MS. SWARNS: And she -- yes. It's further evidence  
02:19 15 that she was tracking and considering and being preoccupied by  
16 the race of the jurors that were being considered in this case.

17 We know that Ms. Davenport says, for example,  
18 that she struck -- when she was asked about specifically Juror  
19 Walker, she ultimately said, "I don't really have an excuse for  
02:20 20 her. On paper, she looks like a very good juror." Those were  
21 her words.

22 THE COURT: Walker was one of the ones that was  
23 struck.

24 MS. SWARNS: Yes, exactly. And on paper she looks  
02:20 25 like a very good State's juror. Again she retreats to the

02:20 1 place that, "It must have been something that I saw that's not  
2 reflected by the record. It's not in my independent  
3 recollection, and it's not in my refreshed recollection."

02:20 4 Well, that is -- she's -- given the fact that the  
5 reasons that she's offered to justify the strikes, for  
6 Ms. Walker for example -- she accepted White jurors who shared  
7 similar characteristics. The conclusion to be drawn, of  
8 course, is the missing thing that she can't remember is that  
9 Ms. Walker was African-American and she struck her on account  
02:20 10 of race.

11 She also says that she has no idea why she seated  
12 White Juror Beverly Willett.

13 THE COURT: That's the one who --

14 MS. SWARNS: Yes.

02:20 15 THE COURT: -- who gave that answer on the  
16 questionnaire on the last section to --

17 MS. SWARNS: Yes, "most hideous practice of our time."

18 THE COURT: Yeah. She basically gave an answer that  
19 would disqualify her under Witherspoon. What was -- which one  
02:21 20 was that? That was --

21 MS. SWARNS: I was talking about Ms. Willett.

22 THE COURT: Yeah, Ms. Willett.

23 MS. SWARNS: She specifically said that she did not  
24 have any idea why she struck Ms. Willett -- I mean, she seated  
02:21 25 Ms. Willett. Of course, Ms. Willett --

02:21

1

THE COURT: What tab number was she?

2

MS. SWARNS: She is Tab Number 14.

3

And she said that over and over. She said -- I'm sorry. Plander. Plander was the one who said, "most hideous practice of our time."

02:21

5

6

THE COURT: What tab number is she?

7

MS. SWARNS: Plander is Tab --

8

MR. GRAY: Eleven.

9

MS. SWARNS: -- 11.

02:21

10

Is that right?

11

MR. GRAY: Yes.

12

MS. SWARNS: Yes.

13

Who she also seated.

14

THE COURT: Right.

02:21

15

MS. SWARNS: So, she seats Ms. Willett, who she testifies she has no idea why she seated; she seats

16

17

Ms. Plander, whose questionnaire indicates that she believes that capital punishment is the most hideous practice of our time; but, of course, she strikes the African-American

18

19

potential jurors who have offered consistently strong support

20

for capital punishment in both their questionnaire and

21

testimony and questioning by Ms. Davenport or Ms. Henderson --

22

no -- Ms. Davenport, Mr. Henderson, and Mr. Boyd during the

23

course of the examination.

24

02:22

25

It's our contention, of course, that the fact



02:22 1 that she accepted White jurors who offered answers that were  
2 much less State friendly than the jurors -- these excluded  
3 White jurors is evidence of intentional discrimination on the  
4 basis of race.

02:22 5 THE COURT: What tab is Ms. Willett, again, please?

6 MS. SWARNS: Ms. Willett is Tab 14. Yes.

7 Should I continue?

8 THE COURT: Yes.

9 MS. SWARNS: Oh, okay.

02:23 10 In addition, Ms. Davenport, when she testified,  
11 she offered reasons for her strikes of the jurors of color --  
12 jurors of color that actual -- she testified that when -- that  
13 when jurors of color offered reasons or statements that were  
14 technically favorable to the State that was a reason for a  
02:23 15 strike.

16 So, for example, Ms. Davenport testified that she  
17 would strike a potential juror of color because that potential  
18 juror believed that you needed to have more than one person  
19 killed in order -- that did not believe -- I'm sorry -- that  
02:24 20 did not believe you needed to have more than one person killed  
21 in order to assess the death penalty. That, of course, makes  
22 no sense.

23 It seems clear that the State would want a juror  
24 who would not require it to produce evidence of multiple  
02:24 25 homicides, even in a case that involves multiple homicides.

0 2 : 2 4 1 You want a juror who believes that the death penalty is  
2 appropriate in a case where even one person is killed.

3 The fact that there are more than one person  
4 killed here, you know, is icing. It means that the person who  
0 2 : 2 4 5 will accept and impose the death penalty for one murder would  
6 certainly impose the death penalty in the face of multiple  
7 murders.

8 And, so, the fact that Ms. Davenport suggests  
9 that this -- I will only -- that one murder is enough is a  
0 2 : 2 4 10 reason for a strike is ridiculous and it makes no sense for a  
11 State prosecutor to purport.

12 THE COURT: What juror said that?

13 MS. SWARNS: Ms. Taylor -- hang on a second.

14 THE COURT: Who was it?

0 2 : 2 5 15 MS. SWARNS: We're just pulling it together right now.

16 Ms. Taylor, stricken Juror Taylor. She  
17 offered -- she offered that explanation for a strike.

18 THE COURT: What tab number was she?

19 MS. SWARNS: Twenty-two.

0 2 : 2 7 20 It's just Ms. Taylor.

21 THE COURT: Okay.

22 MS. SWARNS: In addition -- I'm sorry. Oh, yes.

23 In addition, she said that she struck potential  
24 jurors of color when they indicated that they would always  
0 2 : 2 7 25 answer the first special issue "yes."

0 2 : 2 7 1 The first special issue asks whether a  
2 prospective -- the first special issue asks whether or not the  
3 criminal -- the facts underlying the criminal conviction  
4 establish that the murder was committed deliberately, whereas  
0 2 : 2 7 5 the basis upon which the conviction rests is evidence that  
6 the -- that the crime was intentional. And, so, she asks, "Is  
7 there a difference in your mind between 'intentional' and  
8 'deliberate'?"

9 Those prospective jurors she points to said, "No,  
0 2 : 2 7 10 there is no difference," indicating that they would find --  
11 they would answer the first special issue "yes" based on the  
12 conviction itself, she strikes. That, of course, makes no  
13 sense because the State, once again, would want to have a juror  
14 who would be inclined to answer each of the special issues  
0 2 : 2 8 15 favorably.

16 But in the face of jurors of color who say that  
17 they're more inclined, basically, to impose the death penalty  
18 for a defendant who's been convicted of first -- of capital  
19 murder, she will -- she strikes them, that's a basis for a  
0 2 : 2 8 20 strike.

21 So, again, on two bases at least, she offers  
22 reasons -- testimony that should be favorable to the State as  
23 reasons for a strike of potential jurors of color. She also  
24 offers reasons for her strikes which are just simply not  
0 2 : 2 8 25 supported by the record. With respect to Juror Hamilton, for

02:28 1 example, she said she struck him because he gave inconsistent  
2 answers with respect to his brother's conviction. That's  
3 simply belied by the record. His answers on the questionnaire  
4 are entirely consistent with the testimony that he gave --

02:29 5 THE COURT: Okay. I think I don't agree with you on  
6 that one.

7 MS. SWARNS: Okay.

8 THE COURT: Even when I was reading the  
9 questionnaire --

02:29 10 MS. SWARNS: It was -- we had long --

11 THE COURT REPORTER: Excuse me.

12 THE COURT: We can't talk at the same time. I already  
13 told you that one time.

14 MS. SWARNS: I'm sorry.

02:29 15 THE COURT: I don't think that I agree with you there  
16 because even when I was looking at it I was confused. And the  
17 question required her to make an assumption about whether or  
18 not he might have testified as a witness in some particular  
19 case, which wasn't clear from the forms. There was no way of  
02:29 20 being able to make that determination about whether or not he  
21 might have been a witness in that criminal trial.

22 The assumption might be it's his brother's case,  
23 the brother killed the wife or something like that. I've  
24 forgot what the case was about. It was some case involving the  
02:29 25 brother in a criminal case. And you are asking her to make the

02:29 1 assumption that it would have been unreasonable for her to  
2 assume that he might have been involved in that case somehow.

3 Which tab was that?

4 MS. SWARNS: That's Tab 18.

02:29 5 No. I'm sorry.

6 THE COURT: Pardon me?

7 MS. SWARNS: I'm sorry.

8 THE COURT: Hamilton is 18.

9 MS. SWARNS: Is that right?

02:30 10 THE COURT: Yeah.

11 MS. SWARNS: Yes, Hamilton is Number 18. Okay.

12 THE COURT: Where is the questionnaire?

13 MS. SWARNS: The second box -- the first is the juror  
14 information form, which is the second box down.

02:30 15 THE COURT: On the first page.

16 MS. SWARNS: After the -- yes, after the affidavit.

17 And it indicates -- the question that the juror  
18 information form asks is, "Have you ever been an accused  
19 complainant or witness in a criminal case?"

02:30 20 And he says, "No."

21 THE COURT: Hold on a second.

22 "Have you ever been an accused, complainant, or  
23 witness in a criminal case?"

24 And he says "no" on this one, but he said "yes"  
02:30 25 on the long.

02:30 1 MS. SWARNS: Right. Okay. And on the long form, on  
2 Page --

3 THE COURT: 23, right, 23 or 47?

4 MS. SWARNS: Twenty-three or forty-seven. The  
02:30 5 question is posed, "Have you, a family member, a close friend  
6 ever been personally involved in a criminal case as a  
7 defendant, a victim, a witness, or a complainant?"

8 And he says, "Yes."

9 Then, when he is asked during the course of his  
02:31 10 examination about this, he indicates that his brother was  
11 involved in a murder. There is no testimony indicating that he  
12 was a witness to that event. There is no testimony indicating  
13 that Mr. Hamilton was ever asked by Ms. Davenport, who was, in  
14 fact, questioning him, whether he was a witness to that event.

02:31 15 The only evidence that we have on this -- on this  
16 offense was that his brother was involved in a crime, which he  
17 acknowledged, and that he was not involved in a crime, which he  
18 acknowledged.

19 Now, is it possible that she speculated that he  
02:31 20 was a witness? It's certainly possible, but there's no basis  
21 upon which to assume that that was the case.

22 THE COURT: Okay.

23 MS. SWARNS: Okay. So, clearly Ms. Davenport, if that  
24 was an issue of concern to her, could have had the opportunity  
02:32 25 to ask Mr. Hamilton whether, in fact, there was an

02:32 1 inconsistency between his questionnaires and his testimony.  
2 She chose not to do so.

3 THE COURT: And she examined him?

4 MS. SWARNS: Yes. Yes, she did.

02:33 5 She chose not to do so. And based on the  
6 evidence that he offered in court, there is no inconsistency  
7 between what he said and what he wrote on his forms. So,  
8 there's simply no evidence to suggest a conflict.

9 Any evidence -- I mean, you know, we could  
02:33 10 presumably assume -- Ms. Davenport could assume that there are  
11 lots of conflicts, based on answers given in the  
12 questionnaires, if she's allowed to do so with no reason to  
13 do -- with no reason for it.

14 Here there's no reason to assume a conflict.  
02:33 15 She's assuming a conflict without any reason for that. And we  
16 believe that that assumed conflict -- she's assuming a problem  
17 in the face of a juror of color when she would not do so in the  
18 face of a prospective White juror.

19 The record reflects that Ms. Davenport, on more  
02:34 20 occasions than I had time to compile for this argument, offered  
21 reasons for her strikes that simply -- that she simply did not  
22 apply to White prospective jurors. One that leaps out to my  
23 mind is that she struck jurors of color who purported to offer  
24 some pause with respect to proof -- the "proof beyond a  
02:34 25 reasonable doubt" standard; but she specifically accepted

0 2 : 3 4 1 the -- the seated White juror, Ms. Willett, who said  
2 consistently and until the end she would -- that the burden she  
3 would apply was "beyond all doubt."

0 2 : 3 4 4 Ms. Willett never wavered from that position, and  
5 Ms. Davenport accepted her. And but she excused prospective  
6 jurors of color who said that they would not hold the State to  
7 that high of a burden. And that's just one example of the many  
8 times that Ms. Davenport offered reasons for her strikes, that  
9 simply do not hold up when compared to the accepted White  
0 2 : 3 5 10 jurors in this case.

11 And on numerous occasions, Ms. Davenport also  
12 offered reasons for strikes that she never bothered to ask the  
13 prospective jurors about. We have now identified one with  
14 respect to Mr. Hamilton. That comes up on numerous occasions  
0 2 : 3 5 15 throughout.

16 THE COURT: Which was -- what was that?

17 MS. SWARNS: That when -- she would proffer --

18 THE COURT: Oh, you mean about --

19 MS. SWARNS: -- a reason for a strike and then the  
0 2 : 3 5 20 record reflects she did not ask -- it was not an issue that she  
21 inquired about during her examination.

22 And the Supreme Court, in Miller-El, has noted  
23 that all of these things that we have pointed out are evidence  
24 of intentional discrimination. The failure to inquire on an  
0 2 : 3 5 25 issue of purported concern; a history of discrimination in the



02:35 1 county; the evidence that an excluded -- a juror was excluded  
2 for a reason that -- for a factor, I guess, or a characteristic  
3 that was held by seated White jurors; a pattern of strikes  
4 against peremptory -- against jurors of color; statements by  
02:36 5 the prosecutor, reflecting a consideration of race; the taking  
6 of notes reflecting a tracking of race, these are all the  
7 factors that the United States Supreme Court, in Miller-El and,  
8 more recently, in Snyder, have noted are strong evidence of  
9 discrimination.

02:36 10 This is a case where there is an enormous amount  
11 of evidence suggesting consideration of race, an enormous  
12 amount of unexplained evidence of consideration of race. And  
13 we also have the fact that Ms. Davenport offered, with respect  
14 to all of these jurors, a laundry list of reasons which, you  
02:36 15 know, over and over were established to be false when, you  
16 know, compared to the record, do not hold when compared to  
17 seated White jurors, and are unsupported by the record.

18 So, it is our view that, in the words of the  
19 United States Supreme Court and, again, in Miller-El -- and I  
02:37 20 will quote them -- "At some point the significance of the  
21 evidence is open to judgment calls; but when this evidence on  
22 the issues raised is viewed cumulatively, its direction is too  
23 powerful to conclude anything but discrimination."

24 That's all we have.

02:37 25 THE COURT: Oh, okay. I'm sorry. I didn't know that

0 2 : 3 7 1 you were finished. I beg your pardon.

2 MS. SWARNS: Unless your Honor has questions.

3 THE COURT: No, actually, I don't. But thank you.

4 I need to take a break. Five minutes. Okay?

0 2 : 3 7 5 *(Recess taken from 2:37 to 2:44 p.m.)*

6 THE COURT: All right. Thank you, everybody.

7 All right. Please be seated, everybody.

8 Ms. Miranda, any closing statements from the  
9 respondents, please?

0 2 : 4 4 10 MS. MIRANDA: Yes, your Honor. First I would like to  
11 address Mr. Rosales' counsel's position -- apparent position  
12 that Mr. Henderson's testimony in this cause is irrelevant  
13 because Ms. Davenport was primarily the one responsible for the  
14 strikes made in this case. And that assertion is disputed by  
0 2 : 4 4 15 her deposition testimony, on Page 33, when she was asked by  
16 counsel, "Okay. Who made the final decision on which jurors to  
17 strike?"

18 And her response was, "Keno and I would  
19 together."

0 2 : 4 4 20 And, so, I just wanted to put that before the  
21 Court to say that it is not just the testimony of Ms. Davenport  
22 that is relevant here; it is also the testimony of  
23 Mr. Henderson.

24 However, to deal with the testimony --

0 2 : 4 5 25 THE COURT: Was she lead counsel?

02:45 1 MS. MIRANDA: She was, in fact, lead counsel.

2 THE COURT: Okay.

3 MS. MIRANDA: Yes.

4 THE COURT: I just want to know if there was any  
02:45 5 dispute about that.

6 MS. MIRANDA: No, no. She was definitely first chair  
7 and -- but as far as to the issue of who made the decision on  
8 the strikes, I think the record indicates that her and Keno  
9 collaborated in deciding which jurors to accept. This was not  
02:45 10 a unilateral decision based on her part.

11 Secondly --

12 THE COURT: What more would I have gotten from  
13 Mr. Henderson's testimony, in your view?

14 MS. MIRANDA: I think that there is, one, some  
02:45 15 corroboration, for lack of a better word. They had some of the  
16 same answers. Obviously --

17 THE COURT: I would have gotten that out of the direct  
18 testimony of Henderson, which I already have --

19 MS. MIRANDA: Correct.

02:45 20 THE COURT: -- in terms of the corroboration.

21 MS. MIRANDA: Right. Oh, you're talking about had he  
22 testified here today?

23 THE COURT: You're saying that I don't have any  
24 testimony from Mr. Henderson; but, in fact, I actually do. I  
02:46 25 have his direct examination. And to the extent that there's

02:46 1 corroboration, I assume that it will come out of the direct --

2 MS. MIRANDA: Sure.

3 THE COURT: -- examination.

4 So, what more would I have gotten from the -- the  
02:46 5 petitioner cross-examining Mr. Henderson? Because it's not  
6 true that I don't have his testimony.

7 MS. MIRANDA: Okay. And I --

8 THE COURT: What more would I have gotten from a  
9 cross-examination of Mr. Henderson?

02:46 10 MS. MIRANDA: Okay. And I apologize because I believe  
11 that I have not communicated my position on that --

12 THE COURT: Okay.

13 MS. MIRANDA: -- in the way that I want.

14 My understanding of counsel's argument was  
02:46 15 that -- based on their argument, that Ms. Davenport's reasons  
16 were the most important because Mr. Henderson was not  
17 responsible for making the strikes. And, so, it was apparent  
18 to me from their argument that they were trying to suggest that  
19 his reasons were irrelevant altogether, which would make his --  
02:46 20 even his direct testimony irrelevant.

21 And my response is simply that his direct  
22 testimony is relevant in this court.

23 THE COURT: Okay.

24 MS. MIRANDA: To the extent that that's the argument  
02:46 25 that they were asserting, that this Court should only look at

02:46 1 Ms. Davenport's testimony, my response to that is you should  
2 look to -- exactly, to the direct testimony that you already  
3 have in the record.

4 THE COURT: Okay. Okay.

02:47 5 MS. MIRANDA: Okay?

6 And, secondly, they asserted that there were no  
7 race neutral reasons set out in the record. That is also  
8 incorrect. They both filed affidavits, they testified in  
9 depositions, and they testified -- at least Norma Davenport --  
02:47 10 in this court, identifying race neutral reasons, reasons that  
11 are neutral on the face of them, for why they struck the juror.

12 The question -- the real question before this  
13 Court is whether or not they have now met their burden, because  
14 all they have to do is articulate a race neutral reason and  
02:47 15 then the burden shifts back to the petitioner to demonstrate  
16 that those race neutral reasons are pretextual.

17 And the way that they have asserted that in this  
18 case is there is disparate questioning between the jurors.  
19 They have alleged that the jurors were questioned differently.  
02:47 20 Specifically, in some of their pleadings they said that only  
21 minority jurors were questioned further about the types of  
22 cases. And I believe we pointed out through Ms. Davenport's  
23 testimony, I also believe just simply reviewing the voir dire  
24 testimony will show that that is not, in fact, true, that both  
02:48 25 minority and non-minority jurors, depending on the -- there was

02:48 1 the -- the questions -- or the answers that they gave on their  
2 questionnaires, were asked about which type of cases they found  
3 capital-murder appropriate.

02:48 4 Another example is in their pleadings they allege  
5 that only minorities -- that the prosecutors attempted to use  
6 religion and religious views in an attempt to ferret out  
7 another reason to strike these jurors. And I believe if you  
8 read through the voir dire testimony you'll realize that  
9 there's only a short series of jurors that are questioned about  
02:48 10 religion. And it's at the beginning; and it's about four,  
11 five, or six of them in a row. And then they abandon that.

12 And, so, there's just no indication on the record  
13 that the questioning about religion had anything to do with the  
14 ethnicity of those jurors; but it simply seemed to be something  
02:48 15 that they started, tried for about five jurors, and abandoned.  
16 In fact, only two of the, I believe, seven minority jurors that  
17 we have now were even questioned about their religious views or  
18 their religious backgrounds.

19 And that is just yet another example of  
02:49 20 allegations that they've made regarding disparate  
21 questioning --

22 THE COURT: Can you still hear us? Can you hear both  
23 of us?

24 MR. ROSALES: Yes.

02:49 25 THE COURT: You can hear both of us?

02:49

1

MR. ROSALES: Yes, ma'am. I --

2

THE COURT: I meant to move the mic, but seems that it's fine. You're speaking pretty loudly.

4

MS. MIRANDA: Okay.

02:49

5

Again, your Honor, so, that is yet another example of disparate questioning that they have alleged has occurred that does not hold up in the record.

8

And I do believe -- and I know that it's tedious, and we've all had to do it. But I believe if you read through the voir dire, at least the jurors that are at issue, the seated jurors and the minority jurors, and you -- and you read through it from start to finish, which is a tough task, but you'll realize that there is actually a very similar pattern of questioning that occurs between each of the jurors.

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Now, I think if you want to take an enormous record, an enormous voir dire that happens over several days, possibly several weeks, and you want to break it apart in minutiae, I don't think there is any voir dire in any capital

02:50 1 case that you are going to be able to find where the prosecutor  
2 has been internally consistent about every single thing if you  
3 want to pull them apart.

4 I think what is important is that you look at  
02:50 5 this holistic view of the -- the voir dire just -- and, then,  
6 in each individual juror. And that gets me to the second  
7 point. And the second thing that they have attempted to show,  
8 discriminatory intent in this case; and that is to argue that  
9 there were similarly situated non-minority jurors that were  
02:50 10 accepted when minority jurors were rejected. And not one --  
11 for not one of the minority jurors have they actually shown  
12 that there was a similarly situated non-minority juror.

13 What they would do is there would be several  
14 explanations offered by the prosecutors for why they struck a  
02:51 15 particular juror. They would take one aspect, and they would  
16 compare that to one aspect of one non-minority juror. And,  
17 then, if there was a second aspect, they would take that second  
18 aspect and they would compare that to a different non-White  
19 minority juror. But in no case did they take all of the  
02:51 20 reasons why they struck -- or allegedly struck that and compare  
21 that to a non-minority White juror that was selected and show  
22 another juror that contained all of those reasons.

23 And I believe that's extremely important in this  
24 case because you're talking about -- you get 30 minutes. I  
02:51 25 believe the deposition testimony will bear out that in this



02:51 1 case they had 30 minutes a side. Okay? And they got 30  
2 minutes to question. And you get -- they're coming in  
3 individually. This is not a non-capital case where you've got  
4 the entire panel and you can look at them all at once. You've  
02:52 5 got one juror in front of you; and you've got to decide after  
6 30 minutes, "Do I want this juror or not?"

7 THE COURT: I mean, why would you write their race  
8 down when you only have one juror? Even in cases where I have  
9 an entire panel of people in front of me and when they leave  
02:52 10 out and we've got to make our strikes in the blind, with nobody  
11 sitting in front of me, I write down the race.

12 MS. MIRANDA: Sure.

13 THE COURT: It helps me remember who the people are --

14 MS. MIRANDA: Sure.

02:52 15 THE COURT: -- when somebody gives a -- particularly  
16 if it's somebody who I can tell by their answer that one of the  
17 lawyers is going to get up and make a challenge for cause.

18 MS. MIRANDA: Sure.

19 THE COURT: So, to give myself a trigger to help me  
02:52 20 remember what that person was like, I might write down the race  
21 to help me remember because I got 50 people in the room, they  
22 all leave, and we have to make our strikes in the blind.

23 What is a good reason in a situation where you  
24 don't have any issue like that, you've got one person sitting  
02:52 25 in front of you, and you're going to examine that person and

02:52 1 make your strikes at the conclusion of that examination, what  
2 is any good reason to write down that person's race?

3 MS. MIRANDA: Okay. I believe -- and the record will  
4 be the best evidence of this, but I believe that what  
02:53 5 Ms. Davenport was trying to convey in her answer was the reason  
6 she made those notations was because she was -- they were  
7 trying -- as they were going through, she would sometimes write  
8 down -- first of all, if I can back up and say she only made  
9 those notations on two of the jurors. Okay? That she did not  
02:53 10 make that on all of them. They sort of implied that there was  
11 a ton of them.

12 THE COURT: I know. But it only matters if they  
13 were --

14 MS. MIRANDA: Okay. Okay. I --

02:53 15 THE COURT: Wait. Stop. We're talking at the same  
16 time.

17 MS. MIRANDA: I apologize.

18 THE COURT: If you see my lips moving, stop talking.

19 MS. MIRANDA: Okay.

02:53 20 THE COURT: It only matters if she made those  
21 notations with respect to people that she struck that were  
22 minorities. In the two instances, were those people that were  
23 struck?

24 MS. MIRANDA: Yes, ma'am.

02:53 25 THE COURT: And were they both minorities?

02:53

1 MS. MIRANDA: Yes, ma'am.

2 THE COURT: Okay. Well, then it matters.

3 MS. MIRANDA: Okay.

02:53

4 THE COURT: It's not irrelevant. It's completely  
5 relevant to the issues that this Court has to decide today.

6 Why is there any good reason to write down their  
7 race in the scenario where you just have that person right in  
8 front of you, you do the examination, you make your challenges?

02:53

9 MS. MIRANDA: Absolutely. And, first of all, I  
10 apologize. I was not trying to argue they were irrelevant.

02:54

11 I believe, from Ms. Davenport's testimony, that  
12 what she was trying to say was that as she was questioning  
13 those witnesses and she's -- she's just -- they're coming  
14 before her and she's appearing [sic] them and she -- she  
15 doesn't know right away whether she's going to strike them.  
16 And my impression of what her testimony was, that she tries  
17 sometimes to make notations so that two weeks later, when  
18 they're trying to remember which of the jurors that they  
19 selected, if they pull those questionnaires, she can say, "Oh,  
20 this was this juror. This was this juror."

02:54

21 Because if you'll remember from her testimony --

22 THE COURT: Then, why wouldn't she write down "White  
23 person"?

02:54

24 MS. MIRANDA: I do not know the answer to that, your  
25 Honor.

02:54 1 THE COURT: If she had done that consistently for  
2 Whites and minorities, that would be a good argument.

3 MS. MIRANDA: Okay.

4 THE COURT: But it's not a good argument when the only  
02:54 5 time she writes down the race is when it's a minority person.

6 MS. MIRANDA: And, your Honor, I understand that. And  
7 I don't want to put words in Ms. Davenport's mouth.

8 THE COURT: No, no. I'm asking you in argument.

9 Tell me a good reason why she could write down  
02:54 10 the identifiers on the minority people to remember them two  
11 weeks later and she wouldn't do the same thing with respect to  
12 the White folks.

13 MS. MIRANDA: All I know is that there was one  
14 indication -- and this was -- my initial response was that  
02:55 15 there's -- there's not notations on every one of the jurors.  
16 But there is a notation on one of the non-minority jurors,  
17 where she wrote, "wore a headband in her hair." And, so, I  
18 don't know because we didn't ask her that question; but that  
19 could have been another indication of, "Okay. That's the  
02:55 20 person that I" -- you know, when she pulls it out later and she  
21 sees her name, "Oh, yeah. That was the one who wore the  
22 headband."

23 So, all -- but I am going to tell you this  
24 because I want to be honest with you. That's speculation on my  
02:55 25 part because we did not ask her. But if you want to know my

02:55 1 personal reason about what a good argument was, that would be  
2 my argument. But obviously, you know, this Court has to assess  
3 the credibility of Ms. Davenport.

4 THE COURT: All right.

02:55 5 MS. MIRANDA: All I can tell you is -- is from what  
6 she said.

7 THE COURT: Well, she could have given a race neutral  
8 description of the Black person.

9 MS. MIRANDA: Absolutely. I'm not -- I'm not saying  
02:55 10 that that's the way that, you know, I would do it or any of us  
11 would do it. I'm just -- I'm trying to relate to you what I  
12 believe her reason was. And I think, ultimately, your Honor,  
13 you have to decide --

14 THE COURT: If that was a good reason.

02:56 15 MS. MIRANDA: -- if that was a good reason.

16 THE COURT: It's not a good reason.

17 MS. MIRANDA: Okay.

18 THE COURT: I'm just -- I want to hear what you think.

19 MS. MIRANDA: I know. I know, your Honor. And I know  
02:56 20 you want to hear -- hear what I think. But as a -- you know,  
21 as an attorney and as a prosecutor, I mean, I can only give you  
22 what I think is the truth and what I think is reflected in the  
23 testimony.

24 And I could give you my personal perspective, but  
02:56 25 I do not want to be putting words in her mouth. And I don't --

02:56 1 I don't know.

2 THE COURT: Okay.

3 MS. MIRANDA: Because I'm not sure, if I was in that  
4 situation, I would record them the same way. So, I apologize  
02:56 5 if that's not satisfactory to you.

6 THE COURT: No, no, no. I just want to know what you  
7 think. I mean, it's argument, clearly. And, you know -- and I  
8 had to think about it for a second. You know, in a situation  
9 where there's a whole big panel and you have to make your  
02:56 10 strikes in the blind --

11 MS. MIRANDA: Sure.

12 THE COURT: -- it might make sense to use race as an  
13 identifier. I mean, admittedly, I do it when I'm trying --  
14 especially if it's a juror that I think is going to get  
02:57 15 challenged by one of the lawyers, I write down something that's  
16 going to help me remember who that person was.

17 MS. MIRANDA: Sure.

18 THE COURT: Although, I take pretty copious notes  
19 during voir dire examination; so, I probably have a lot of  
02:57 20 things that I can --

21 MS. MIRANDA: Right.

22 THE COURT: -- use to help me identify a particular  
23 witness.

24 MS. MIRANDA: Right.

02:57 25 THE COURT: But in a scenario where you've just got

02:57 1 one witness in front of you -- one juror in front of you and  
2 you're going to make your strikes right then and there, I'm  
3 trying to think of a good reason, besides two weeks later I'm  
4 going to maybe see them if I don't strike them, that you would  
02:57 5 have to designate the person's race.

6 I can't think of a good reason. And I wondered  
7 if you had sort of, like, in formulating your argument, come up  
8 with in your mind, in the way of argument, some good reason.

9 MS. MIRANDA: Some good reason?

02:57 10 And I have to confess, your Honor, that I do not  
11 know.

12 THE COURT: Okay.

13 MS. MIRANDA: I do not have any reason that I can come  
14 up with on that.

02:57 15 THE COURT: Okay.

16 MS. MIRANDA: So, I'm sorry I can't help your Honor  
17 out with that one.

18 THE COURT: Okay.

19 MS. MIRANDA: If I may continue?

02:57 20 THE COURT: Okay.

21 MS. MIRANDA: One of the other things that I would  
22 like to just emphasize and encourage your Honor, in going back  
23 and looking at this case, is -- you indicated that you took  
24 copious notes; so, I'm hoping that you have the page numbers  
02:58 25 and certain references. But in several instances during

02:58 1 Ms. Davenport's testimony she was -- she was questioned about  
2 whether or not a particular cited reason -- or a response by a  
3 minority juror would be acceptable to the State and she was  
4 given a short portion of the testimony to look at and she  
02:58 5 indicated, "Well, yeah, that was favorable."

6 And, then, the next follow-up question was,  
7 "Well, why wouldn't you accept this juror?"

8 And in more than one occasion, that answer that  
9 she was shown was not indicative of the entire conversation  
02:58 10 regarding that issue on the record.

11 THE COURT: Okay. I understand that.

12 MS. MIRANDA: And there was pages -- and I would just  
13 urge your Honor to, when you're making -- or not just take her  
14 ultimate answer but to go back and realize that sometimes it --  
02:58 15 it was very difficult for her to answer that without actually  
16 being able to recollect each individual's entire voir dire.  
17 So, there are some instances, if I may give you one with  
18 Ms. Lopez, Esmerelda Lopez, about her testimony about whether  
19 the defendant -- his right to silence.

02:59 20 And she ultimately testified that she wouldn't  
21 have a problem with it. And that was the only portion in the  
22 record that was pointed out to her. And only that portion of  
23 her testimony -- I believe it's somewhere around Page 24 of her  
24 testimony -- was then compared to a non-minority juror, who had  
02:59 25 several pages discussing that. And they said, "Well, isn't the



02:59 1 non-minority juror's actually less favorable to the State?"

2 Whereas, if you look at the totality of Ms. Lopez' discussion  
3 on that, it is not.

4 THE COURT: I understand that. I mean, clearly I have  
02:59 5 to look at the entire thing in context.

6 MS. MIRANDA: Okay.

7 THE COURT: I hope you're not suggesting or thinking  
8 that I'm just going to look at --

9 MS. MIRANDA: And I wouldn't think that you would --

02:59 10 THE COURT: Wait. Stop. Did you see me still  
11 talking?

12 MS. MIRANDA: Yes, I did.

13 THE COURT: Stop talking.

14 I hope you're not suggesting that I would just  
02:59 15 look at one individual issue and not look at the person's  
16 entire -- you know, the record of the person's examination in  
17 some context.

18 But there is one in which there's just one  
19 individual issue that sort of particularly bothers me.

03:00 20 MS. MIRANDA: Okay.

21 THE COURT: And it's the witness -- the juror who  
22 testified -- or, I mean, who checked on her form that capital  
23 punishment is the "most hideous practice of our time" and still  
24 got accepted.

03:00 25 I understand that's one thing out of that

03:00 1 witness' entire voir dire examination; but that one really  
2 bothers me, that that was somebody that could be listed by the  
3 prosecution as an acceptable witness [sic] regardless of the  
4 rest of the -- putting the rest of it in context.

03:00 5 And, trust me, I'm going to look at the entire  
6 thing to put that witness' testimony kind of -- what witness  
7 was that?

8 MS. SWARNS: Plander.

9 THE COURT: Plander.

03:00 10 Did you look at her in particular and think --  
11 anything in particular that you think is redeeming that you  
12 want point out to me?

13 Because at this point in time -- because I'm  
14 certainly going to go and look at the whole thing. But tell me  
03:00 15 what you think is redeeming about that person, given that  
16 particular notation on their juror form, that they believe that  
17 capital punishment is the "most hideous practice of our time,"  
18 that would make them, a White juror, acceptable over non-White  
19 jurors who clearly answered "no" to that particular question.

03:01 20 MS. MIRANDA: Sure. And I have two different  
21 responses to that. My first one would be, with respect to  
22 Ms. Plander in particular, is to read her voir dire when they  
23 questioned her about death penalty issues; and her testimony  
24 does not at all reflect that she -- it doesn't necessarily  
03:01 25 match up with that. Her testimony is that there are

03:01 1 appropriate cases for capital punishment in which she could  
2 actually impose capital punishment.

3 My second response to that is, if you read  
4 Ms. Davenport's deposition and -- and she was questioned  
03:01 5 specifically sort of about the role that a person's view on  
6 capital punishment would play in her decision to strike a  
7 juror. She indicated that she wasn't always necessarily  
8 looking for all those -- it wasn't a question of, "Let's get  
9 all the 5's over here, all the strongly in favors, and I'm just  
03:02 10 going to put those on the jury."

11 She indicated that she was -- regardless what  
12 they expressed, whether they were opposed or in favor of the  
13 death penalty, she was looking for someone who could  
14 nevertheless, even if they were opposed, set it aside and  
03:02 15 follow the law. And that was more important to her than  
16 necessarily someone who might support the death penalty, but  
17 just -- she wasn't sure on other issues that they could follow  
18 the law.

19 And I would also like to point out on that that  
03:02 20 there was a lot of attention that was paid to and  
21 Ms. Davenport's was asked many questions about different  
22 jurors' views on the death penalty and, "Isn't this particular  
23 non-minority juror's views on the death penalty more  
24 favorable."

03:02 25 Well, neither Ms. Davenport nor Mr. Henderson, in

03:02 1 their affidavits or in their testimony, have ever specifically  
2 cited someone's underlying views on the death penalty as a  
3 reason why they struck the jurors, not even the minority  
4 jurors. That was never cited as an issue.

03:02 5 The issues that they cited was their ability to  
6 follow the law on things like burden of proof, things like the  
7 special issues, other things, like the right to remain silent.  
8 And, so, I understand how you can look at it and say, "Okay.  
9 Well, that one is more favorable."

03:03 10 And that would be a legitimate -- I think it's a  
11 legitimate concern, regardless. But I think it would be more  
12 critical in this case if the prosecutors had actually cited  
13 those reasons or the position on the death penalty in not --  
14 minority jurors as reasons for striking them, but they haven't  
03:03 15 done that in this case.

16 THE COURT: In any instance?

17 MS. MIRANDA: No.

18 THE COURT: Okay.

19 MS. MIRANDA: No. It's always based on either their  
03:03 20 stance on premeditation, their -- it always had to do with a  
21 particular aspect of the law.

22 THE COURT: Okay.

23 MS. MIRANDA: Lastly, your Honor, I would just like to  
24 assert that if you look through these jurors and you -- you  
03:04 25 read the reasons, in -- in almost every one of them, there is a

03:04 1 single compelling reason that sort of stands out as for why  
2 they're struck. And especially if you look at those reasons in  
3 context with their voir dire, there -- there are only,  
4 admittedly, a couple that you might look at and shake your  
03:04 5 head, say, "I get it on this one. I get it on this one. I get  
6 it on this one. But I'm scratching my head on" --

7 THE COURT: What do you think the single most  
8 compelling reason is for Ms. Holmes?

9 MS. MIRANDA: Well, she would be the one that I think  
03:04 10 Ms. Davenport and even Mr. Henderson admittedly have said it's  
11 someone that they're looking at and they're, like, "I'm not  
12 sure why I struck them." However --

13 THE COURT: So, that's one in which there isn't a  
14 single compelling reason.

03:04 15 MS. MIRANDA: Exactly. And that's why I said "almost  
16 all." I didn't say every single one, because there are. And I  
17 would -- well, I'll get to that in just one second.

18 However, I do want to say that I don't think  
19 simply because the prosecutors, 23 years later, couldn't look  
03:04 20 at a cold record and come up with a reason, I don't believe  
21 that the law anywhere ever suggests, especially in light of the  
22 fact that there were compelling reasons to strike other  
23 non-minority jurors, that we should assume, because they  
24 couldn't immediately articulate something based on the record,  
03:05 25 that it was -- the only other reason that was out there was her

03:05 1 ethnicity.

2 And I think there's no precedent necessarily for  
3 that in the law; and I would urge this Court not to make that  
4 assumption based simply on that, your Honor. And I want to  
03:05 5 address --

6 THE COURT: Based simply on the fact that they  
7 couldn't articulate a race neutral reason for doing it?

8 MS. MIRANDA: Well, your Honor --

9 THE COURT: That's the basis upon which I have to make  
03:05 10 the evaluation.

11 MS. MIRANDA: I'm sorry. I probably didn't argue that  
12 very effectively. They did -- they have made race neutral  
13 reasons. And I would like your Honor also to take note of the  
14 fact that Ms. Holmes was not identified as one of the jurors  
03:05 15 that were contested in this issue until after the prosecutors  
16 had already filed their initial affidavits.

17 So, the first time that they were asked this  
18 question was in their depositions. And, granted, they were  
19 given time to stop and review; but there's no way, in even 30  
03:06 20 minutes, you know -- I mean, you can review their testimony;  
21 but it's a difficult thing to do in that short of time without  
22 having the entire record. And I'm not saying --

23 THE COURT: Okay. When were those depositions taken?

24 March 24th. And here we are -- what are we at?  
03:06 25 April what? The 28th?

03:06 1 Okay. It's not 30 minutes. It's 30 days she's  
2 had to think about that one again. She knew that we were going  
3 to talk about that today. So, that's not a valid observation.  
4 Come on, now.

03:06 5 MS. MIRANDA: Well, as far as why they weren't in  
6 their initial affidavits.

7 THE COURT: Okay.

8 MS. MIRANDA: Not for -- I'm not saying -- I'm just  
9 saying that if you're looking at their affidavits, saying  
03:06 10 there's no reason offered in there, the reason it's not in the  
11 affidavit is because it was not brought to them before that.

12 THE COURT: Initially.

13 MS. MIRANDA: Yes. Yes, your Honor.

14 THE COURT: Okay.

03:06 15 MS. MIRANDA: Now, did you have a question that I had  
16 not answered? I'm sorry. I got off track on that one, as far  
17 as just --

18 THE COURT: No. I mean, at the end of the day, you  
19 can't -- you can't tell me that -- I mean, it seemed to me that  
03:07 20 you were suggesting to me that they didn't have to give a race  
21 neutral reason for striking Holmes. And certainly that is not  
22 the law, and I hope that that was not what you were suggesting.  
23 They still have to give a race neutral reason.

24 MS. MIRANDA: Absolutely. And I believe --

03:07 25 THE COURT: And instead, they gave me no reason.

03:07 1 MS. MIRANDA: Well, I believe that there are reasons  
2 that were suggested in the deposition. Mr. Henderson offered  
3 some.

4 I believe her hesitation -- and this is in the  
03:07 5 record, some hesitation that she had over the burden of proof.  
6 I believe there's the intoxication issue that he also offered  
7 on --

8 THE COURT: Where is that? Because we looked at his  
9 deposition testimony --

03:07 10 MS. MIRANDA: I think --

11 THE COURT: -- today about Holmes. And as I recall,  
12 at the end of it he got to the point where he says he just  
13 didn't know.

14 MS. MIRANDA: I think he was indicating that he didn't  
03:07 15 know why Norma -- I believe that he was saying -- he offered  
16 some reasons, but he didn't know what she was thinking.

17 THE COURT: No. He said, "I don't know what we were  
18 thinking about at the time," as to why that strike was  
19 executed.

03:08 20 MS. MIRANDA: But I believe that prior to that he had  
21 offered some reasons that they could have been thinking.

22 THE COURT: Right.

23 MS. MIRANDA: And I think -- and I think that the  
24 other thing is in this case, in light of the fact that it is --  
03:08 25 it has been, you know, 23 years, it is not difficult to imagine



03:08 1 that they might not know the exact reason. I mean, they've  
2 testified to that with regard to all of these jurors, that they  
3 look at and they say, "Okay. This is what stands out, this is  
4 what stands out, this is what stands out."

03:08 5 And in this case, he's, like, "It could have been  
6 this, it could have been this; but I can't tell you for sure  
7 what the reason was." But that doesn't mean that they haven't  
8 offered a race neutral reason for that, your Honor.

03:08 9 And my argument was not that they don't have to  
10 offer a race neutral reason. It was simply that because there  
11 is not a race neutral reason that is compelling, like in many  
12 of these other jurors, that simply because it's not as  
13 compelling, to jump to the assumption that it must, therefore,  
14 be based on -- that the strike was based on something like race  
03:09 15 instead of her other proffered explanation, which was that  
16 there may have been something -- obviously, from her testimony  
17 or whatever, that we didn't like.

03:09 18 So, I'm not at all suggesting that she didn't  
19 have to offer race neutral. I'm just arguing that the  
20 assumption shouldn't necessarily be made that because the  
21 reason was not as compelling as the rest of them that it had to  
22 have been race.

03:09 23 THE COURT: But she didn't give a reason. She just  
24 said, "Must have been something I didn't like." Is that a  
25 reason really? Is that an articulated race neutral reason,

03:09 1 "Must have been something I didn't like about her"?

2 MS. MIRANDA: Your Honor, I believe, in the context of  
3 voir dire, it can be. I mean, I believe that you can question  
4 people -- there's -- I mean -- that you can question someone  
03:09 5 and you can say, "They give me the right answers, they do the  
6 right things; but I don't know. There's just something that I  
7 can't articulate." And I do believe that she testified that  
8 there were times --

9 THE COURT: Isn't that what the Supreme Court said,  
03:10 10 that we have to sort of cut through -- I mean, doesn't that  
11 just completely gut Batson and Miller-El, for them to just be  
12 able to say, "I don't have to give a reason. I just didn't  
13 like them"? I mean, that's what the Supreme Court said they  
14 shouldn't be able to do.

03:10 15 MS. MIRANDA: Right.

16 THE COURT: They said that you should be able to give  
17 a race neutral reason and it can't be, "I just didn't like that  
18 person."

19 MS. MIRANDA: Right.

03:10 20 And I understand with Ms. Davenport that she  
21 wasn't able to articulate a reason, but Mr. Henderson had some  
22 that he did offer.

23 THE COURT: Okay.

24 MS. MIRANDA: And, again, your Honor, just in closing,  
03:10 25 to argue the totality of the voir dire in considering whether

03:10 1 or not this was a case in which jurors were struck on the basis  
2 of race, not just to pick apart and pull apart certain  
3 instances, but to look at each one of them in a holistic  
4 approach, as the prosecutors have to do when they're making  
03:11 5 those decisions.

6 THE COURT: You said that.

7 MS. MIRANDA: Thank you.

8 THE COURT: But thanks for reminding me to do my job.

9 MS. MIRANDA: Okay.

03:11 10 THE COURT: Anything else from the petitioner?

11 MS. SWARNS: I would just like to make four very small  
12 points.

13 The argument that Ms. Miranda has asserted, that  
14 your Honor has to find two identical jurors, was specifically  
03:11 15 reject -- it was argued by her office in Miller-El, it was  
16 adopted by the Fifth Circuit in Miller-El, and it was  
17 specifically rejected by the United States Supreme Court in  
18 Miller-El.

19 The United States Supreme Court in Miller-El said  
03:11 20 jurors are not cookie cutters, you will never be able to find  
21 two jurors with the exact same constellation of  
22 characteristics. And, then, the Court, of course, as your  
23 Honor knows, went on to do exactly what we have done, which is  
24 to examine the explanations that were offered by the  
03:11 25 prosecutors and determine whether they were applied to

03:11 1 similarly situated White jurors. So, that argument simply has  
2 no basis in law.

3 I would also like your Honor to remember that the  
4 strikes that were exercised by Ms. Davenport were exercised  
03:12 5 before Batson came down.

6 THE COURT: Right. I remember.

7 MS. SWARNS: Okay. And so, obviously, Ms. Davenport,  
8 as she acknowledged, had no reason to believe that she was  
9 prohibited at the time she exercised these strikes, by the law,  
03:12 10 against Black jurors, to do so. So, there's reason to believe  
11 that that's exactly what she was doing.

12 Ms. Miranda argues that the 23 year lapse, you  
13 know, should be taken into consideration. And I want to make  
14 very clear, as I think your Honor knows, Mr. Rosales had been  
03:12 15 arguing and asking to be heard on this claim for every minute  
16 of those 23 years. He first raised this claim during the jury  
17 selection, and he has not stopped raising it since.

18 It is the prosecutors' offices that have  
19 consistently asserted that his claim should not be heard and  
03:12 20 the merits should not be considered. It's the reason that it  
21 has taken 23 years for us to have a prosecutor take a witness  
22 stand and offer those reasons.

23 THE COURT: Well, I know. But that doesn't mean that  
24 I can't take into consideration --

03:13 25 MS. MIRANDA: I know but --

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THE COURT: Stop. I'm talking.

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-- that I can't and shouldn't take into consideration that in 23 years the prosecutor's memory with respect to some of these issues might be a little bit shaky. I mean, I can't just ignore the fact that 23 years have passed and that some of their testimony and some of their answers are obviously going to be, you know, influenced by the fact that they probably can't remember half of this stuff. So, I don't know.

The fault at this point in time is totally irrelevant in terms of whether or not the passage of time is relevant to my consideration of the veracity of their answers. Anyway --

MS. SWARNS: I understand, your Honor.

And my only other point was to say that Mr. Rosales, in his consistent litigation of this claim, has always asserted that -- a challenge with respect to all stricken minority jurors. It has never changed. It has never wavered. It has always been the same. All minority jurors was the basis of his challenge.

I have nothing further.

THE COURT: Oh, in terms of whether or not that was raised before --

MS. SWARNS: Exactly.

THE COURT: -- the people had the opportunity to do

03:14

1 their affidavits?

2

MS. SWARNS: Exactly.

3

THE COURT: Even in his initial pleadings in this case?

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03:14

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MS. SWARNS: Yes, uh-huh.

6

THE COURT: Okay. You guys want to do any more briefing?

7

8

MS. SWARNS: I don't believe we will; but if any additional, very small discrete legal issue may present itself, can we submit something within the next ten days?

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THE COURT: What is today? Today is Tuesday, the 29th?

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By the end of next week. What's the end of next week, next Friday? What's the date?

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A CLERK: It is --

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THE COURT: Should be, like, May the --

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A CLERK: May the 2nd.

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THE COURT: No. That would be this Friday. It should be, like, May the 9th.

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A CLERK: Oh, I think it's the 10th. It's May 6th.

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THE COURT: I'm sorry. Shouldn't it be May the 9th, next Friday?

22

23

A CLERK: It is May 9th.

24

THE COURT: Okay. May 9th, then. If you have

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anything else you want to send me on some discrete issue --

03:15 1 don't rehash the whole thing. I don't want to see that. Trust  
2 me, I got enough briefing and argument and evidence from you  
3 guys. You don't have to sort of just re-summarize that for me.  
4 That will not help me. That will just delay me being able to  
03:15 5 get this done.

6 If you find something else, I need to have it  
7 from you by May the 9th.

8 MS. SWARNS: Thank you, your Honor.

9 THE COURT: And any response by May the 19th.

03:16 10 I'm going to try to get something to you guys at  
11 least by the end of May, maybe and maybe not. I mean, because  
12 it just depends how long takes me to read it. Obviously, I'm  
13 not going to be rushed on it. So, I might get it by the end of  
14 May or I might not get it by the end of May.

03:16 15 Sometimes I take cases like this and I read the  
16 thing, like, one month and then I put it down and decide I'm  
17 going to wait another month before I read it again, you know.  
18 It's isn't something, after 23 years, that I'm going to be  
19 rushed to come to a conclusion on. So, I'll --

03:16 20 MS. SWARNS: I understand.

21 THE COURT: But I am going to start looking at some  
22 things, you know, pretty quickly. So, I have to -- so, I just  
23 want you to know that, to the extent that you're interested in  
24 sending me anything, because I am going to be reading some  
03:17 25 things over relatively quickly.

03:17 1 All right. I'm keeping my set of exhibits that  
2 you guys provided to me. I got that new exhibit that you just  
3 gave me today.

4 The Donna Douglas Cooper questionnaire, that was  
03:17 5 going to be Exhibit Number 5, Ms. Miranda.

6 So, I've got all five of the exhibits; and I  
7 thank you.

8 Mr. Rosales, we are going to be signing off at  
9 this time, sir. And thank you for your participation, and I'm  
03:17 10 sorry for the little glitch that we had earlier but glad that  
11 we were able to get you back online so that you could hear what  
12 was going on. All right, sir?

13 MR. ROSALES: Yes, ma'am. Yes, your Honor.

14 Can I say something -- can I say something now?

03:17 15 THE COURT: Yes, sir.

16 MR. ROSALES: Can I say something?

17 THE COURT: Yes, sir.

18 MR. ROSALES: Okay. I don't know if there's anybody  
19 from the -- from the Balboa family or from the Rodriguez family  
03:17 20 there in the court, ma'am; but I want to apologize to them --

21 THE COURT: No, there's not --

22 MR. ROSALES: -- because I want to apologize to --

23 THE COURT: Go ahead, sir. I just didn't hear you.

24 MR. ROSALES: I want to apologize for all the trouble  
03:18 25 that I cause the Court and the judicial system, ma'am. And I



03:18 1 just want to say that.

2 THE COURT: All right. There were some other folks  
3 here yesterday. Who else was here yesterday?

4 MS. SWARNS: All the family of Mr. Rosales.

03:18 5 THE COURT: Well, who was here?

6 UNIDENTIFIED MALE: My brother was here, Mariano, Jr.

7 THE COURT: Mariano was here yesterday.

8 These are people you didn't get to see yesterday  
9 because of the configuration, and I feel badly that I didn't  
03:18 10 think about that until today. But Mariano was here yesterday.

11 UNIDENTIFIED MALE: Hector.

12 THE COURT: And Hector.

13 UNIDENTIFIED MALE: Elvis.

14 THE COURT: And Elvis.

03:18 15 UNIDENTIFIED MALE: Ruben.

16 THE COURT: And Ruben.

17 UNIDENTIFIED MALE: And Victoria.

18 THE COURT: And Victoria were all here yesterday.

19 MR. ROSALES: Yes, ma'am. Yes, ma'am. Thank you,  
03:18 20 your Honor.

21 THE COURT: But nobody from --

22 UNIDENTIFIED MALE: Nobody from the other family.

23 THE COURT: But nobody was here from the other family  
24 yesterday, just to let you know who was here. I apologize for  
03:18 25 not explaining that to you earlier.

03:18 1 Did you know everybody that was here on behalf of  
2 you, in terms of your attorneys? Were you ever able to see all  
3 the folks --

4 MR. ROSALES: Yes, your Honor.

03:19 5 THE COURT: You were?

6 MR. ROSALES: No. I seen Christina -- I saw Christina  
7 Swarns, but I didn't see the rest of them.

8 THE COURT: You never saw all the rest of your  
9 lawyers?

03:19 10 Come on up here, Mr. Gray. Stand up here so he  
11 can see you. He should be at least able to lay his eyes on the  
12 person whose voice he's been listening to for a couple of days.

13 MR. GRAY: Hello, sir.

14 THE COURT: And there's Mr. Gray, who was your lawyer  
03:19 15 who was questioning the witnesses on yesterday. All right?

16 MR. ROSALES: Good to see you, sir.

17 Yes, ma'am. Thank you, your Honor.

18 THE COURT: And Ms. Swarns was here. You know  
19 Ms. Swarns, though, right?

03:19 20 MR. ROSALES: Yes. Yes, ma'am, I know Ms. Swarns.

21 THE COURT: Okay. I just wanted to make sure that you  
22 got to see who was here for you in the case.

23 All right. Well, we're going to be signing off,  
24 then.

03:19 25 MR. ROSALES: Thank you, your Honor.

03:19 1 THE COURT: I don't know how we sign off, but somebody  
2 will help me figure that out.

3 Thank you, sir.

4 (*Proceedings adjourned*)

5 \* \* \* \* \*

6 COURT REPORTER'S CERTIFICATION

7 I certify that the foregoing is a correct transcript from  
8 the record of proceedings in the above-entitled cause.

9 Date: July 22, 2008

10  
11 /s/ Cheryll K. Barron

12 Cheryll K. Barron, CSR, CMR, FCRR  
13 Official Court Reporter  
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